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IN THE

# Supreme Court of the United States

OCTOBER TERM—1944

No. 44

GERHARD WILHELM KUNZE, AUGUST KLAPPROTT, GUSTAV ELMER, HERMANN SCHWINN, HERMAN AGNE, JOSEPH BACHMAIER, JOSEF BELOHLAVEK, CARL FREDERICK BERG, WALTER BORCHERS, OTTO BREGLER, ERNEST MARTIN CHRISTOPH, OTTO FENTZKE, JOHN C. FITTING, BRUNO KNUPFER, WILLIAM C. KUNZ, WILLIAM OTTERSBACH, MAX RAPP, LOUIS SCHATZ, WALTER SCHNELLER, JR., HUGO WEISS, KARL RICHARD WENDLANDT, OTTO WILLUMEIT, FRITZ STREUER,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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POINT I

The Circuit Court of Appeals erred in holding that incriminating statements, oral and written, taken by agents of the Federal Bureau of Investigation in violation of 5 U. S. C. A. §300a from men under arrest but before arraignment, were admissible against those men when on trial, and that in any event their reception into evidence did not prejudice other defendants on trial with them as co-conspirators ..... 20

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IN THE

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GERHARD WILHELM KUNZE, AUGUST KLAPPROTT, GUSTAV ELMER, HERMANN SCHWINN, HERMAN AGNE, JOSEPH BACHMAIER, JOSEF BELOHLAVEK, CARL FREDERICK BERG, WALTER BORCHERS, OTTO BREGLER, ERNEST MARTIN CHRISTOPH, OTTO FENTZKE, JOHN C. FITTING, BRUNO KNUPFER, WILLIAM C. KUNZ, WILLIAM OTTERSBACH, MAX RAPP, LOUIS SCHATZ, WALTER SCHNELLER, JR., HUGO WEISS, KARL RICHARD WENDLANDT, OTTO WILLUMEIT, FRITZ STREUER,

Petitioners,

*—against—*

UNITED STATES OF AMERICA,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

***CONSOLIDATED BRIEF ON BEHALF OF ALL PETITIONERS REPRESENTED BY ASSIGNED COUNSEL.***

## Opinion Below.

The opinion below of the Circuit Court of Appeals for the Second Circuit is officially reported in 141 F. (2d) 248

(1944) and is included in the printed transcript of the record filed herein (R. 1070-85).*

No opinion was rendered by the District Court for the Southern District of New York.

## Jurisdiction.

The jurisdiction of this Court is invoked pursuant to Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. §347).

## Statement of the Case.

***District Court Proceedings.***

Indictment 112-336, charging violation of Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. A. §311), was returned in the District Court for the Southern District of New York on July 7, 1942 against all of the petitioners above named except Agne and Streuer. Each of the petitioners above named against whom indictment 112-336 was returned pleaded not guilty to that indictment when they were arraigned on July 9, 1942. A further indictment, 112-486, charging the same crime as indictment 112-336, was returned on August 26, 1942 against the petitioners Agne and Streuer who thereafter pleaded not guilty to the latter indictment.

The two indictments were consolidated and tried before Alfred D. Barksdale, U. S. D. J., and a jury, commencing on September 17, 1942. At the close of the Government's case, motions for a directed verdict were made on behalf of all defendants and all such motions were denied (R. 844). On October 19, 1942 the jury acquitted the defendant Fer-

* All references to the record are to pages in the printed transcript thereof.

dinand Calisen (R. 1027) and convicted all petitioners (R. 1027-28). Motions to set aside the verdict were made on behalf of all petitioners and all were denied (R. 1028-29, 1032-33). On October 21, 1942 all petitioners were sentenced "to serve a term in such penal institution as the Attorney General may direct for a period of five years" (R. 1060-61).

***Circuit Court of Appeals Proceedings.***

A notice of appeal (R. 1063) to the Circuit Court of Appeals for the Second Circuit, signed by all petitioners, was filed on October 23, 1942. This notice of appeal set forth twelve grounds of appeal (R. 1066). An order signed by Judge Learned Hand and Judge Swan on February 8, 1943 (R. 1067) provided that the printing of the record on appeal should be dispensed with; that the appeal should be heard upon the stenographer's minutes and "upon the relevant papers (or copies thereof) on file in the office of the Clerk of the District Court"; and that such exhibits as counsel deemed necessary in connection with the argument of the appeal should be submitted in their original form for consideration by the Circuit Court of Appeals. An order signed by Judge Learned Hand on March 12, 1943 (R. 1068) provided that the stenographic transcript of the trial record, including all exceptions therein noted by petitioners' counsel, should constitute the Bill of Exceptions and Assignments of Error. A stipulation entered into between the United States Attorney and counsel for petitioners, approved by Judge Learned Hand and Judge Leibell on April 15, 1943 (R. 1069) certified the correctness of the transcript of the testimony and the exhibits. The appeal was argued before the Circuit Court of Appeals (Augustus N. Hand, Chase and Clark, Circuit Judges) on November 15 and 16, 1943. On February 29, 1944 the decision by the Circuit Court of Appeals was rendered affirming all judgments

of conviction as against all petitioners (R. 1070-85). The order of affirmance was entered by the Circuit Court of Appeals on March 17, 1944.

***Supreme Court Proceedings to Date.***

The petition for certiorari herein was filed in this Court on March 29, 1944. A writ of certiorari was granted May 15, 1944. Simultaneously with the granting of the writ of certiorari, this Court granted the motion of the petitioners for leave to proceed *in forma pauperis* and directed that the expense of printing the record be paid by the United States pursuant to 28 U. S. C. A. §832.

***Indictment.***

Since the indictment returned on August 26, 1942 is identical with the indictment returned on July 7, 1942, except for the names of the defendants against whom the respective indictments were directed, the two will be treated as one (R. 1-4, 6).

This indictment charges that from January 1, 1940 to the date of the indictment the defendants conspired to counsel divers persons to evade, resist and refuse service in the land and naval forces of the United States in violation of Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. A. §311) and the regulations promulgated thereunder.

The remainder of the indictment sets forth the various alleged acts comprising the conspiracy substantially as follows: The defendants would be members of the German-American Bund. Keegan would be its counsel. The other defendants would be either national officers, district leaders or local leaders. National headquarters of the Bund would be maintained at 178 East 85th Street, New York City, where Keegan would occupy offices.

The national officers, in conference with Keegan, would prepare Bundesbefehle (Bund commands), customarily in the German language, for distribution to the local leaders who in turn, pursuant to directions from the national officers, would read or make known to persons attending the local meetings the contents of the Bundesbefehle.

On or about October 1, 1940 a certain Bundesbefehle No. 37* would be prepared at and distributed from national headquarters counseling those to whom the contents were made known to evade, resist and refuse service in the land or naval forces of the United States. Bundesbefehle No. 37 would be read or otherwise made known by the local leaders to persons attending the meetings of the local groups.

The national officers and others would prepare and distribute "The Free American", a German language newspaper, in which would be published by the national officers, Keegan and others, certain items urging German-American citizens to resist, refuse and evade service in the land and naval forces of the United States.

And finally the defendants would "otherwise" urge German-American citizens to resist the provisions of the Selective Training and Service Act of 1940 and to evade service in the land and naval forces of the United States.

***Statutes.***

Petitioners were indicted for having violated Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. A. §311) which provides, so far as relevant, as follows:

> "* * * any person * * * who knowingly counsels, aids or abets another to evade registration or service in the land or naval forces * * * or conspire to do so, shall, upon conviction in the district court of the

* Received in evidence as Government's Exhibit 73 (R. 75).

> United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *."

Also involved in this case is Section 8 (i) of the Selective Training and Service Act of 1940 (50 U. S. C. A. §308(i)) which provides as follows:

> "(i) It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person who is a member of the Communist Party or the German-American Bund."

Incriminating statements were taken from certain of the petitioners by agents of the F. B. I. while these agents were violating the mandate of Congress which requires arresting officers immediately to take the person arrested before a committing officer. The basic provision of the Criminal Code violated by the agents of the F. B. I. is set forth in 18 U. S. C. A. §595 (1894) as follows:

> "It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial * * *"

Even more explicit is the mandate of Congress directed particularly at the F. B. I. in respect to the requirement of an immediate arraignment following arrest, as set forth in 5 U. S. C. A. §300a (1934):

"The Director, Assistant Directors, agents, and inspectors of the Federal Bureau of Investigation of the Department of Justice are empowered * * * to make arrests * * * *but the person arrested shall be immediately taken before a committing officer* * * *". (Emphasis added.)

***Evidence.***

During the month required to try this case, nearly 1600 typewritten pages of testimony were stenographically transcribed. The Government called 66 witnesses, the majority of whom were agents of the Federal Bureau of Investigation, and introduced approximately 400 documentary and physical exhibits into evidence. The District Court called one witness and introduced one exhibit. The defendants did not call any witnesses and did not take the witness stand themselves; they did introduce seven exhibits.

The Government, to prove its case, relied principally upon a series of statements signed by the defendants. These statements were taken by agents of the F. B. I. Most of them were signed on May 26, 1942, approximately six weeks before the first indictment was returned. Several of the statements were taken subsequent to May 26. All were taken before the defendants were arraigned.

The Government introduced a great number of physical exhibits, such as uniforms of the "O. D.", the group which ushered at formal functions and conventions of the Bund (R. 370); these consisted of numerous shirts, trousers, belts, caps, armbands, ties and boots. Fifteen pictures of Hitler were introduced. Innumerable flags, pennants and swastikas were received in evidence. Pamphlets bearing such titles as "New Germany under Hitler", "Germany and the Jewish Problem", "Hitler is Right" and "Blood is Holy" were marked in evidence. The trial court also admitted such

things as song books, ash trays, ladies' handkerchiefs, pins, buckles, buttons. It is perfectly obvious that none of these physical exhibits had any real relevance to the crime charged in the indictment. Their admission into evidence, however, did serve to charge the atmosphere of the court room with prejudice to such an acute degree as to make it utterly impossible to accord to the defendants a fair trial.

The principal witness called by the Government was the defendant Luedtke who had pleaded not guilty on July 10, 1942 and then on July 14, after four days of conferences with the United States Attorney, pleaded guilty (R. 215-16). Luedtke testified at great length concerning the organization of the Bund, its personnel, its property and the manner in which it operated. The only testimony which he gave material to the crime charged, however, was to the effect that the Bund, its officers and unit leaders were, and always had been, "in favor and not opposed to compulsory military service" (R. 214); that their only reservation was that American troops should not be sent out of the territorial limits of the United States (R. 278). Congress incorporated in the Selective Training and Service Act when it was passed in September of 1940 this very reservation, namely, that persons inducted under the terms of the Act should not be employed beyond the limits of the Western Hemisphere (50 U. S. C. A. §303(e)).

Aside from Luedtke, agents of the F. B. I., numerous translators and stenographers, the Government called some persons who had been present at meetings of the local units to testify as to what had been said or done concerning the Selective Training and Service Act. Not one of these witnesses testified that any defendant had counseled anyone or others to evade, resist or refuse service in the land and naval forces of the United States. Most of them testified positively that no such advice ever had been given. At most, they testified that certain of the defendants had

urged efforts to obtain repeal of the discriminatory provision contained in Section 8(i) of the Act (50 U. S. C. A. §308(i)), above set forth.

## Representation of Petitioners.

This consolidated brief is filed on behalf of all petitioners represented in this Court by assigned counsel. For the convenience of the Court, there is set forth in Appendix C of this brief a chart showing the representation of all petitioners in this case, as well as in No. 39, in this Court and in the courts below.

Counsel were assigned originally by the District Court to represent the defendants at their trial in the District Court and, at the request of the Circuit Court of Appeals and of this Court, the same assigned counsel have continued to represent the defendants, that is, those who desired representation, on their appeals to the Circuit Court of Appeals and to this Court, with some changes due to the entry of several counsel into the military and governmental services.

Only one attorney has received compensation for his services in this case: John J. Broderick, Esq., who represented the petitioner Keegan in the District Court. Keegan has appeared as attorney pro se in the Circuit Court of Appeals and in this Court. No one of the assigned counsel has received so much as a penny for his services in the District Court, the Circuit Court of Appeals or in this Court. Substantial disbursements have been paid by the assigned counsel out of their own pockets.

At the specific request of seven of the petitioners who were represented in the District Court and in the Circuit Court of Appeals by assigned counsel, this Court has permitted them to appear as attorneys pro se in this Court.

## Reasons Previously Urged upon this Court for Allowance of Writ of Certiorari.

**1. The Decision by the Circuit Court of Appeals below is believed to be in conflict with the applicable decisions of this Court.**

This Court in *McNabb* v. *United States*, 318 U. S. 332 (1943), and *Anderson* v. *United States*, 318 U. S. 350 (1943), reversed convictions based on incriminating statements procured by federal agents while violating the mandate of Congress which requires arresting officers immediately to take an arrested person before a committing officer (5 U. S. C. A. §300a; 18 U. S. C. A. §595).

Upon facts in the instant case in all essential respects strikingly parallel to the facts of the *McNabb* and *Anderson* cases,* the Circuit Court of Appeals refused to follow those two cases, but not without some hesitation. In its opinion (R. 1084), the Circuit Court of Appeals frankly acknowledged doubt as to its decision on this point in the following language: "But even if we are wrong in our interpretation of the *McNabb* decision * * *."

**2. The decision by the Circuit Court of Appeals below is believed to be in conflict with other decisions by Circuit Courts of Appeals on the same matter.**

The decisions by this Court in the *McNabb* and *Anderson* cases have been expressly adhered to in the following cases in all of which convictions have been reversed:

(a) *Gros* v. *United States*, 136 F. (2d) 878 (C. C. A. 9th, 1943), where the defendant had been convicted

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* See Appendix A, showing parallel between facts of the instant case and facts of the *McNabb*, *Anderson*, *Gros*, *Haupt*, *Hoffman* and *Runnels* cases on this point.

of having been an agent of the German government and having failed to register as such, and also of having conspired to disclose to the German government certain information concerning this nation's national defense; his conviction had been based upon written and oral statements taken by agents of the F. B. I. while he was under arrest but before arraignment.

(b) *United States* v. *Haupt*, 136 F. (2d) 661 (C. C. A. 7th, 1943), where the defendants had been convicted of treason; the admission of an incriminating statement against one defendant was held to have incriminated all defendants; and oral statements were held equally to be condemned with written statements when taken by agents of the F. B. I. while the defendants were under arrest but before arraignment; the Circuit Court of Appeals below in the instant case (R. 1083) expressly disapproved the decision in the *Haupt* case.

(c) *United States* v. *Hoffman*, 137 F. (2d) 416 (C. C. A. 2nd, 1943), where the defendant had been convicted of violating Section 11 of the Selective Training and Service Act of 1940; his conviction was based on certain incriminating statements procured by agents of the F. B. I. from the defendant while he was under arrest but before he was arraigned; in the *Hoffman* case the Circuit Court of Appeals for the Second Circuit, which refused to follow the *McNabb*, *Anderson* and *Haupt* cases in the instant case on appeal to that court, held those three cases rendered inadmissible the incriminating statements taken from the defendant in the *Hoffman* case.

(d) *Runnels v. United States*, 138 F. (2d) 346 (C. C. A. 9th, 1943), where the defendant had been convicted of murder, his conviction was based upon written incriminating statements procured by federal officers over a period of seventeen days while the defendant was imprisoned in a county jail and before any complaint had been filed against him and before he was arraigned.

The result of the decision by the Circuit Court of Appeals in the instant case, therefore, in refusing to follow the *McNabb* and *Anderson* cases, is in conflict with decisions by the Circuit Court of Appeals for the Seventh and Ninth Circuits, as well as being in conflict with a prior decision by the Circuit Court of Appeals for the Second Circuit.

Moreover, we believe that the Circuit Court of Appeals below, in holding that the District Court did not err in charging the jury that the defendants' intention to bring a test case to determine the constitutionality of Section 8(i) of the Selective Training and Service Act of 1940 was immaterial to the guilt or innocence of the defendants, has raised a conflict with the decisions by the Circuit Court of Appeals for the Sixth and Eighth Circuits in *Landen* v. *United States*, 299 Fed. 75 (C. C. A. 6th, 1924) and *Fall* v. *United States*, 209 Fed. 547 (C. C. A. 8th, 1913). The decision by the Circuit Court of Appeals below in the instant case on the necessity of a corrupt motive in a conspiracy case is directly in conflict with the local law of the State of New York as found in *People* v. *Powell*, 63 N. Y. 88 (1875) and *People* v. *Flack*, 125 N. Y. 324, 26 N. E. 267 (1891).

**3. The decision by the Circuit Court of Appeals below is believed to have decided an important question of Federal Law which has not been, but should be, settled by this Court.**

The effect of the decision by the Circuit Court of Appeals below (R. 1083), in construing 5 U. S. C. A. §300a (which directs that "the person arrested shall be *immediately* taken before a 'committing officer") to be identical with 18 U. S. C. A. §595 (which does not command *immediate* arraignment), is to read out of the statute relating to the conduct of agents of the F. B. I. the requirement of immediate arraignment. The decision by the Circuit Court of Appeals below (R. 1083) proposes to substitute the words "with all convenient speed" for the word "immediately" now found in the statute. To permit agents of the F. B. I. to present arrested persons for arraignment at the "convenience" of the arresting agents is to leave wide open the possibilities of "secret interrogation of persons accused of crime" and "resort to those reprehensible practices known as the 'third degree'" which this Court sought to check in its decision in the *McNabb* case by insisting rigorously upon the requirement of immediate arraignment which Congress deemed advisable to include in the statute. We believe that the question of interpretation of an Act of Congress, raised by the decision of the Circuit Court of Appeals below, should be settled by this Court, although, with all deference, we had supposed this question had been settled beyond dispute by the unambiguous language of this Court in the *McNabb* case.

**4. The decision by the Circuit Court of Appeals below has sanctioned a departure by the District Court so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.**

In reversing the convictions in the *McNabb* case based on incriminating statements procured by federal agents while the arrested men were in custody and before any order of commitment was made, this Court rested its decision upon the supervisory power of the Supreme Court over the administration of criminal justice in the federal courts (318 U. S. 332, 340). In the light of the decision by the Circuit Court of Appeals below which surely restricts and in large measure nullifies the standard of conduct established by plain and unmistakable language in the *McNabb* case, we invoke this Court's supervisory power to reaffirm in the instant case the standard established in the *McNabb* case.

This Court suggested in the *McNabb* case a preliminary hearing by the District Court for the purpose of determining whether incriminating statements were obtained in violation of the mandate of Congress directing immediate arraignment. There was no such preliminary hearing in the instant case. Indeed, under the standard of "convenient" arraignment as distinguished from "immediate" arraignment adopted by the Circuit Court of Appeals below, a preliminary hearing to determine the admissibility of incriminating statements would be a mockery, for the only issue to be determined would be whether the defendant had been arraigned with that degree of speed consistent with convenience to the arresting agents of the F. B. I. Certainly this was not the standard of conduct nor the issue to be determined at a preliminary hearing which this Court contemplated in its decision in the *McNabb* case.

The circumstances under which the statement of the defendant Kunze was obtained in the instant case—circum-

stances sanctioned by the Circuit Court of Appeals—well illustrate the danger of substituting for the requirement of "immediate" arraignment the requirement of arraignment "with all convenient speed" proposed by the court below. Kunze was first taken into custody in Mexico sometime prior to July 4, 1942 at the direction of the F. B. I. (R. 795). He was transferred, still under arrest, to an agent of the F. B. I. in Texas on July 4, and taken by airplane to New York City where he arrived at 8:15 A. M. on Sunday, July 5 (R. 794). Although he had slept only occasionally during his airplane trip, to the knowledge of one of the F. B. I. agents who questioned him (R. 795), he nevertheless was questioned, under arrest and confined to a cell, from 11 A. M. on July 5 until 5 A. M. on July 6, at which time he signed the incriminating statement later admitted in evidence against him (R. 794, 796). Thereafter, three days later, on July 9, he was arraigned on the indictment under which he later was tried (R. 1062). Kunze therefore was under arrest for a period of six or seven days before he was arraigned. The Circuit Court of Appeals below excused this delay in part on the ground that "to expect arraignment on the Fourth of July, or Sunday, would require a promptitude that we do not regard as contemplated by the statutes."* We respectfully submit that the statute not only contemplated but commanded precisely such promptitude. In the City of New York, as well as in every hamlet and city throughout the land, com-

* The notion by the Circuit Court of Appeals that delay is to be excused if occasioned by temporary unavailability of a committing magistrate is supported by some authority of doubtful and inconsequential character. *Bullock* v. *United States*, 122 F. (2d) 213, 215 (App. D. C. 1941); *Janus* v. *United States*, 38 F. (2d) 431, 437 (C. C. A. 9th, 1930); *United States* v. *Kibbs*, 10 Fed. 369, 375 (W. D. N. C. 1881). The unequivocal mandate of the statute here involved and the plain meaning of the *McNabb* case, however, afford no basis whatever for the rationalization by the Circuit Court of Appeals of the utterly inexcusable delay in arraigning Kunze and Wendlandt in the instant case.

mitting officers are available twenty-four hours every day throughout the year, including holidays and Sundays, for the very purpose of determining whether arrested men are properly detained. This is precisely the function of United States Commissioners, available in every federal district in the country. To have held Kunze one hundred and fifty hours without arraignment was utterly inexcusable, as well as contrary to both the letter and the purpose of the statute commanding immediate arraignment.

Undoubtedly one of the fundamental purposes underlying the statute, which this Court had in mind in enunciating the *McNabb* decision, was to assure to an arrested man the advice *by a committing magistrate* (not by an investigating or arresting officer) that the arrested man need not submit to questioning nor sign a statement unless he desires to and that he not only is entitled to but should be strongly urged to obtain counsel. The distinction between such advice given by a judicial officer on the one hand and an arresting officer on the other hand, is of course great. The decision by the Circuit Court of Appeals below, in proposing a standard of arraignment "with all convenient speed", would operate effectually to preclude timely judicial advice to an arrested man. Zealous arresting officers would not be human if they found it convenient to arraign a prisoner before obtaining a statement from him.

The decision below (R. 1080, 1083) moreover appears to rest at least in part upon what is believed to be the voluntary character of the statements in question, despite the express rejection of the test of voluntariness by this Court in the *McNabb* decision (318 U. S. 332, 340).

The foregoing are some of the considerations which we believe warrant this Court in exercising its power of supervision over the administration of criminal justice in the federal courts in respect to the serious departure sanctioned by the Circuit Court of Appeals below from the

standard of conduct established by this Court in the *McNabb* case.

Moreover, we believe that the Circuit Court of Appeals below, in condoning the District Court's abuse of discretion in denying the defendants' motion to have a juror withdrawn and a mistrial declared in view of the prejudicial press release issued during the trial by the Department of Justice declaring that the defendants had committed the very crime for which they were on trial, has sanctioned a departure by the District Court so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Convictions have been reversed or mistrials declared under similar circumstances. *Griffin* v. *United States*, 295 Fed. 437 (C. C. A. 3rd, 1924); *Harrison* v. *United States*, 200 Fed. 662 (C. C. A. 6th, 1912); *United States* v. *Montgomery*, 42 F. (2d) 254 (S. D. N. Y. 1930) and *Meyer* v. *Cadwalader*, 49 Fed. 32 (C. C. E. D. Pa. 1891).

Likewise we believe this Court should exercise its power of supervision over the administration of criminal justice in the Federal Courts by calling a halt to the practice, which was resorted to in the instant case and which has become common in the District Courts, of admitting into evidence a great mass of physical and documentary exhibits which have no relevance to the issues before the court but are calculated only to inflame and prejudice a jury sitting in time of war. Voluminous evidence of this character was introduced at the trial of Anthony Cramer for treason in the District Court for the Southern District of New York and was expressly approved by the Circuit Court of Appeals for the Second Circuit in *United States* v. *Cramer*, 137 F. (2d) 888, 897 (C. C. A. 2nd, 1943). This Court granted certiorari in the *Cramer* case on November 8, 1943 and after the case was argued in this Court on March 9, 1944, entered an order on May 22, 1944 directing that the case be reargued in this Court at the October 1944 term.

## Specification of Errors Urged.

The Circuit Court of Appeals erred

1. In holding that incriminating statements, oral and written, taken by agents of the Federal Bureau of Investigation, in violation of 5 U. S. C. A. §300a, from men under arrest but before arraignment, were admissible against those men when on trial, and that in any event, their reception into evidence did not prejudice other defendants on trial with them as co-conspirators.

2. In condoning the abuse of discretion by the District Court, after having refused to instruct the jury not to read newspaper accounts of the trial, in denying the defendants' motion to have a juror withdrawn and a mistrial declared on the ground that prejudicial newspaper articles had appeared in the metropolitan press, the said newspaper articles having been based upon a press release issued during the trial by the Department of Justice declaring that the defendants had committed the very crime for which they were on trial.

3. In condoning the District Court's admission into evidence of a great mass of physical and documentary exhibits having no relevance to the issues before the court, but calculated only to inflame and prejudice a jury sitting in time of war.

4. In holding that the District Court did not err in charging the jury that the defendants' intention to bring a test case to determine the constitutionality of Section 8(i) of the Selective Training and Service Act of 1940 was immaterial to the guilt or innocence of the defendants.

5. In holding that the indictment was sufficient although it failed to charge the only conspiracy condemned in Section 11 of the Selective Training and Service Act of 1940, viz., a conspiracy to hinder or interfere by force or violence with the administration of the Act.

6. In holding that the indictment was sufficient although it charged the defendants with having conspired to counsel others to "evade, resist and refuse" service in the land and naval forces of the United States in violation of Section 11 of the Selective Training and Service Act of 1940, whereas that statute by its very terms proscribes only conspiracies to counsel others to "evade" service.

7. In holding that there was sufficient evidence to sustain the verdict of the jury as against each defendant, particularly if there be excluded the incriminating statements taken in violation of 5 U. S. C. A. §300a while the defendants were under arrest but before arraignment and the mass of prejudicial and inflammatory exhibits having no relevance to the issues before the court.

# ARGUMENT

## POINT I.

**The Circuit Court of Appeals erred in holding that incriminating statements, oral and written, taken by agents of the Federal Bureau of Investigation in violation of 5 U. S. C. A. §300a from men under arrest but before arraignment, were admissible against those men when on trial, and that in any event their reception into evidence did not prejudice other defendants on trial with them as co-conspirators.**

The spearhead of the Government's case against the defendants was a series of eighteen incriminating statements signed by certain of the defendants* and admitted into evidence by the District Court. Aside from these incriminating statements, the Government relied principally upon the testimony of the defendant Luedtke who had pleaded guilty and then testified for the Government. On cross-examination, however, the usefulness of Luedtke as a witness for the Government was largely nullified (R. 209-245; 274-281). See *Anderson* v. *United States*, 318 U. S. 350, 356 (1943).

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* The defendants whose statements were admitted into evidence and the exhibit numbers by which each was designated are as follows: Bachmaier, Exhibit 299; Belohlavek, Exhibit 260; Berg, Exhibit 187(a); Borchers, Exhibit 183 and 184; Callsen, Exhibit 203; Christoph, Exhibit 298; Fentzke, Exhibit 355; Fitting, Exhibit 202; Knupfer, Exhibit 151; Kunz, Exhibit 354; Kunze Exhibit 358; Ottersbach, Exhibit 356; Schatz, Exhibit 242; Weiss, Exhibit 204; Wendlandt, Exhibits 309, 330 and 331. While we believe that all of these statements were obtained under circumstances which made them inadmissible as evidence against the defendant (see *United States* v. *Haupt*, 136 F. (2d) 661, 666-667 (C. C. A. 7th, 1943)), we have selected those by Kunze and Wendlandt as best illustrating the error committed by the trial court in admitting these statements.

We believe that on the authority of two decisions rendered by this Court on March 1, 1943 reversing convictions based on written incriminating statements procured by continuous questioning of wrongly imprisoned men, the Circuit Court of Appeals below should have reversed the convictions of all the defendants because of the admission into evidence particularly of two statements by the defendants Kunze and Wendlandt.

The two decisions to which we refer as authorities are: *McNabb* v. *United States*, 318 U. S. 332 (1943) and *Anderson* v. *United States*, *supra*. These decisions subsequently have been followed by the Circuit Courts of Appeals for the Ninth, Seventh and Second Circuits in *Gros* v. *United States*, 136 F. (2d) 878 (C. C. A. 9th, 1943), *Runnels* v. *United States*, 138 F. (2d) 346 (C. C. A. 9th, 1943), *United States* v. *Haupt*, 136 F. (2d) 661 (C. C. A. 7th, 1943), and *United States* v. *Hoffman*, 137 F. (2d) 416 (C. C. A. 2nd, 1943). The Circuit Court of Appeals below (R. 1079-1084) refused to follow the *McNabb* and *Anderson* cases and expressed disapproval (R. 1083) of the *Haupt* case. To our knowledge, no other Circuit Court of Appeals has refused to follow the *McNabb* and *Anderson* cases.

The statements of Kunze and Wendlandt were inadmissible for the reason that they were taken by agents of the F. B. I. while those agents were violating the mandate of Congress which requires arresting officers immediately to take the person arrested before a committing officer. The basic provision of the Criminal Code violated by the agents of the F. B. I. as set forth in 18 U. S. C. A. §595 (1894) as follows:

> "It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial . . . .".

Even more explicit is the mandate of Congress directed particularly at the F. B. I. in respect to the requirement of an immediate arraignment following arrest, as set forth in 5 U. S. C. A. §300a (1934):

> "The Director, Assistant Directors, agents, and inspectors of the Federal Bureau of Investigation of the Department of Justice are empowered * * * to make arrests * * * *but the person arrested shall be immediately taken before a committing officer* * * *". (Emphasis added.)

The statements of Kunze and Wendlandt, taken by agents of the F. B. I. while Kunze and Wendlandt were under arrest but before arraignment, were therefore taken by arresting officers in violation of the statutory provisions above set forth. Under the authorities cited, the statements were inadmissible and convictions based on such illegal evidence should be reversed.

**A. *Kunze's Statement of July 6, 1942* (Exhibit 358).**

The circumstances under which the F. B. I. procured the written statement of the defendant Gerhard Wilhelm Kunze on July 6, 1942 disclose a particularly flagrant violation of 18 U. S. C. A. §595 and 5 U. S. C. A. §300a, set forth above.

Kunze arrived at La Guardia Airport at 8:15 A.M. on July 5 in the custody of two F. B. I. agents (R. 794), having been in the custody of Mexican officials on July 4 (R. 795). Upon his arrival at La Guardia Airport, Kunze was released into the custody of two other F. B. I. agents who took him to the New York office of the F. B. I., fingerprinted him, photographed him, booked him and locked him in a cell (R. 794). One of the F. B. I. agents who then began to question Kunze knew that he had slept only occasionally during his airplane trip from Mexico (R. 796). Neverthe-

less while under arrest and confined to a cell he was questioned from 11 A.M. on July 5 until 5 A.M. on July 6, at which time he signed the statement admitted into evidence as Exhibit 358 (R. 794, 795). Thereafter, three days later, on July 9, he was arraigned (R. 1062).

At least three F. B. I. agents were present during the questioning of Kunze and when he signed the statement (R. 796). At no time during this period of imprisonment prior to his signing the statement was any relative or friend permitted to see him. He had no lawyer present. Indeed there is no evidence that he requested the assistance of counsel or that he was told he was entitled to counsel. It is true that he was informed that he did not have to make any statement unless he so desired; that if he did make a statement it might be used against him in court; and that he would be promised no immunity or remuneration (R. 788). There is no evidence that Kunze was threatened or coerced in any way or that rudeness of manner was resorted to in questioning him.

The statement of the defendant Kunze which was admitted in evidence could hardly have been more incriminating, inflammatory and prejudicial to the rights of every defendant on trial. By incriminating, we mean not only in the narrow sense of confessing the crime charged, but in the broader sense that Kunze's statement was the most effectual single weapon utilized by the Government in obtaining the convictions of all the defendants. In it he stated that he left the United States on November 8, 1941 for the dual purpose of renouncing his American citizenship and enlisting in the German Army, and that "If the war were confined to American-Japanese hostilities, my sentiments would be favorable to Japan to the extent that a nation of one hundred million people needs a certain amount of room in which to live, unless it is to be condemned to a voluntary suicide." The defendant Kunze who made this statement was the na-

tional leader of the Bund, the man with whom the Government claimed all the defendants were in close association and with whom the Government sought to prove the other defendants had conspired to violate the Selective Service Act. Assertions made by the defendant Kunze in Exhibit 358, by the very design of the Government's case, certainly incriminated all the defendants on trial, as well as Kunze, before the jury.

The admission of this statement into evidence was objected to by counsel for the defendant Kunze and this objection was deemed by the court as extending to all defendants (R. 788). The incriminating effect of this statement upon all defendants on trial is beyond dispute, notwithstanding the court's instruction to the jury "that the statement which will now be read to you applies only and should be considered by you only in your consideration of the charges against the defendant Kunze, who made the statement." This instruction by the court did not cure the incriminating effect of the statement upon the other defendants on trial. It has been squarely so held in *Anderson* v. *United States, supra*, at p. 356, and in *United States* v. *Haupt, supra*, at p. 666.

**B. *Wendlandt's Statement of July 8, 1942* (Exhibit 331).**

The written statement of the defendant Karl Richard Wendlandt which was marked Exhibit 331 was taken on July 8, 1942 while Wendlandt was under arrest and confined to the Erie County jail in Buffalo, New York (R. 691). He had been arrested the previous afternoon (R. 682). The record does not show that Wendlandt was taken before a United States commissioner or a judge prior to the taking of this statement, although he had been imprisoned for a day before the statement was signed.

The statement itself, although in its most incriminating aspects couched in the negative, is highly inflammatory and prejudicial to all the defendants. After first alluding to

his use of alias names, it then proceeds to give assurance that Wendlandt has "never entered into any subversive activities against the United States" and that he "never at any time entered into espionage or sabotage of any kind." The power of suggestion often surpasses the influence of direct assertion. It would be difficult indeed to conceive of statements more cruelly calculated than these to poison the minds of a jury sitting in a Federal court in wartime, and less than two months after the execution of the Nazi saboteurs who landed by submarine on the east coast of this country. Just the fact that Wendlandt would be asked by an agent of the F. B. I. about possible subversive activities or possible crimes of espionage and sabotage (crimes for which he was not on trial in the instant case) was highly incriminating and intensely prejudicial to Wendlandt, as well as to all the defendants, before the jury.

Wendlandt was advised by the F. B. I. agent who took his statement that he was entitled to have an attorney if he desired one; that he need not make the statement or sign it if he did not wish to; and that the statement might be used against him in court (R. 691). There is no evidence that any force or threat of force was exerted against Wendlandt in procuring this statement; on the contrary, so far as is disclosed by the testimony of the F. B. I. agent who in his own handwriting composed and wrote out the statement signed by Wendlandt, the statement was given and subscribed to voluntarily (R. 691). Nevertheless, he was confined to a jail while this statement was being given, as well as prior thereto, and saw neither friend nor relative nor counsel, so far as the record shows.

For the reason that this statement, Exhibit 331, was procured by the agents of the F. B. I. prior to their taking Wendlandt before a United States commissioner or a judicial officer in order to determine the sufficiency of the justification for their detention of him, as required by 18

U. S. C. A. §595 (1894) and 5 U. S. C. A. §300a (1934), the statement was obtained while Wendlandt was wrongly imprisoned and therefore was inadmissible as evidence. Over the objection of counsel for the defendants, however, the statement was received in evidence by the trial judge (R. 692).

Although the jury was instructed that "the statement is admitted for your consideration in the case against the defendant Wendlandt only" (R. 692), it is perfectly patent that this incriminating statement implicated all the defendants, as well as Wendlandt. The convictions of all the defendants, including Wendlandt, therefore should be reversed. *Anderson* v. *United States, supra*, at p. 356; *United States* v. *Haupt, supra*, at p. 666.

Equally inadmissible as the written statement signed by Wendlandt on July 8, 1942, were the oral statements made by him to the F. B. I. agent at or about the time the written statement was taken, to the effect that Bund Command No. 37 was either passed around or read aloud at one of the meetings of the local unit of the Bund in Buffalo and at that time the Bund Command was also discussed at a meeting (R. 693). Since these oral incriminating statements were made by Wendlandt after he was imprisoned and before he was arraigned, they also were inadmissible. *United States* v. *Haupt, supra*, at p. 667; *Gros* v. *United States, supra*, at pp. 881-882.

In the recital which follows of the facts concerning the incriminating statements admitted in the *McNabb*, *Anderson*, *Gros*, *Haupt*, *Hoffman* and *Runnels* cases (in all of which cases convictions were reversed because of the admission of the incriminating statements), there will be seen a close parallel between the facts of the instant case on appeal, and those cases.*

* See also Appendix A showing parallel between facts of the instant case and facts of the *McNabb*, *Anderson*, *Gros*, *Haupt*, *Hoffman* and *Runnels* cases on this point.

C. *McNabb* v. *United States*, 318 U. S. 332 (1943).

In this case five members of the McNabb family were indicted for second-degree murder of an officer of the Alcohol Tax Unit of the Bureau of Internal Revenue in the mountains near Chattanooga, Tennessee (p. 333).* They were tried and three of them were convicted in the District Court for the Eastern District of Tennessee. The Circuit Court of Appeals for the Sixth Circuit affirmed the convictions (p. 333). On appeal to the Supreme Court, however, these convictions were reversed solely for the reason that the convictions were based in part upon incriminating statements (p. 345) obtained under the following circumstances.

The officer of the Alcohol Tax Unit was killed at 10 P. M. on July 31, 1940 (p. 334). Between 1 and 2 A. M. on August 1st, three of the McNabbs were arrested (p. 334); a fourth was arrested by the local police and turned over to the Federal authorities at 10 A. M. on August 1st (p. 335); and the fifth voluntarily surrendered at 9 A. M. on August 2nd (p. 337). No one of the McNabbs was taken before a United States commissioner or a judge (pp. 334, 337, 344), although they were taken directly to the Federal building in Chattanooga (pp. 334, 335, 338). Over a period of 48 hours (p. 345), however, and while under detention (p. 345), these men were questioned by agents of the Alcohol Tax Unit who succeeded in obtaining from the three who were convicted incriminating admissions which later were received in evidence at the trial (p. 333). These statements were objected to by the defendants at the trial only on the ground that they were obtained through coercion (p. 349). Both court and jury determined the statements

* All references to opinions of the United States Supreme Court are to pages in the Official Reports.

had been voluntarily given (p. 349). The two defendants who made no incriminating admissions were acquitted at the direction of the trial court (p. 338). None of the defendants took the witness stand (p. 349).

During the course of the questioning by the Federal officers, the arrested men saw neither relative nor friend nor lawyer (pp. 335, 336, 345). There is no evidence that they requested the assistance of counsel or that they were told they were entitled to counsel (pp. 335, 336, 345). At least six officers were present during most of the questioning (p. 336). The arrested men were advised that they did not have to make a statement unless they desired to; that they need not answer any questions asked unless they wished to; that any statement made by them would be used against them; and that they need not fear any use of force (p. 336). There is no evidence that the arrested men were threatened by the officers in any manner (p. 337).

In this Court the defendants who had been convicted urged that the admission of the incriminating statements at the trial constituted a violation of that clause in the Fifth Amendment which provides that no person "shall be compelled in any criminal case to be a witness against himself" (p. 339). The Government argued that the clause of the Fifth Amendment invoked by the defendants made inadmissible only involuntary admissions, and since the incriminating statements of the defendants had been voluntarily given, such statements had been admitted properly by the trial court (p. 339).

In reversing the judgments of conviction, however, this Court, in an opinion by Mr. Justice Frankfurter, rested its decision, not upon the Constitutional test of "voluntariness" which had been urged, but upon the supervisory power of this Court over the administration of criminal justice in the federal courts (p. 340). Condemning the judicial function assumed by the arresting officers in departing from

their role as investigators by procuring statements from the defendants before they were arraigned, this Court pointed out that the agents of the F. B. I. had violated those acts of Congress set forth above at pp. 21-22 of this brief (pp. 341-342). The purpose behind the mandate of Congress which the arresting officers violated in the course of obtaining the incriminating statements from the defendants was then vigorously stated by this Court. And finally, in applying the procedural requirement of the statute to the detention of the defendants in the case at bar and concluding that the conviction based on statements obtained while the men were wrongly imprisoned could not stand, the Court stated (pp. 344-345):

> "The circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoined by Congress upon federal law officers. Freeman and Raymond McNabb were arrested in the middle of the night at their home. Instead of being brought before a United States commissioner or a judicial officer, as the law requires, in order to determine the sufficiency of the justification for their detention, they were put in a barren cell and kept there for fourteen hours. For two days they were subjected to unremitting questioning by numerous officers. Benjamin's confession was secured by detaining him unlawfully and questioning him continuously for five or six hours. The McNabbs had to submit to all this without the aid of friends or the benefit of counsel. *The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made. Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts them-*

*selves accomplices in willful disobedience of law.* Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law." (Emphasis added.)

The similarity between the facts of the *McNabb* case and the facts of the instant case is striking. The crucial point is that the incriminating statements of the defendants Kunze and Wendlandt, including the oral confessions of the latter, and the questioning leading up to those statements took place while Kunze and Wendlandt were in the custody of the arresting officers and before any order of commitment was made. Convictions based on statements procured under such circumstances cannot stand.

**D. *Anderson* v. *United States*, 318 U. S. 350 (1943).**

Here some twenty-one striking miners were indicted in the District Court for the Eastern District of Tennessee for conspiring to dynamite certain power lines and steel towers owned by the T. V. A. in Polk County, Tennessee (p. 352). Of those indicted, eight were convicted (p. 351). The Circuit Court of Appeals for the Sixth Circuit affirmed the convictions (p. 351).

Against six of the defendants who were convicted there had been admitted at the trial certain incriminating statements (p. 353). The Government's case was based principally upon these statements, together with the testimony of an informant whose credibility was under severe attack (p. 356). The statements were obtained by agents of the F. B. I. over a period of six days during which the men were held in custody at the Y. M. C. A. by the Sheriff of Polk County and his deputies (p. 353). The arrested men were not taken before any magistrate or other committing

officer as required by a Tennessee statute (p. 352) similar to the provisions of 18 U. S. C. A. §595 (1894) and 5 U. S. C. A. §300a (1934), set forth above at pp. 21-22 of this brief, until after they had been questioned and their statements had been obtained by the F. B. I. (p. 356). During this period of detention, the defendants saw neither friend nor relative nor counsel (pp. 353, 356).

In reversing the judgments of conviction of all eight defendants solely for the reason that the incriminating statements which were admitted against six of the defendants at the trial had been procured in violation of a Tennessee statute which prohibited a person's detention until after examination by a magistrate, this Court held that the inadmissibility of such statements was not cured by the fact that the F. B. I. agents who actually took the statements were not formally guilty of the illegal detention of the arrested men; the working arrangement between the F. B. I. and the Sheriff of Polk County which resulted in the procurement of the incriminating statements while the men were wrongly imprisoned was tantamount to unlawful detention of the men by the F. B. I. while the statements were being taken (p. 356).

From the standpoint of the instant case, the decision of this Court in the *Anderson* case is of significance chiefly because the inadmissibility of the incriminating statements in the latter case caused the reversal of the convictions, not only of the six defendants who had made the statements, but of two other defendants who had not given statements. In this regard, this Court, speaking through Mr. Justice Frankfurter, said (pp. 356-357):

> "The Government urges that, even if the confessions are held to be inadmissible, only the convictions of the six petitioners who confessed should be reversed. The prosecution rested principally on these confessions and

the testimony of an informant, Freed Long, whose credibility was under severe attack. *The incriminating statement of each petitioner implicated all the others, including those who did not confess.* * * * There is no reason to believe, therefore, that confessions which came before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as to the others. Since it was error to admit these confessions, we see no escape from the conclusion that the convictions of all the petitioners must be set aside." (Emphasis added.)

On the authority of the *Anderson* case, we believe that the convictions, not only of the defendants Kunze and Wendlandt, but of all the petitioners should be reversed.

**E. *Gros* v. *United States*, 136 F. (2d) 878 (C. C. A. 9th, 1943).**

The defendant in this case was indicted and convicted in the District Court for the Southern District of California on a charge of having been an agent of the German government and failing to register as such, and also of having conspired to disclose to the German government certain information concerning this nation's national defense (p. 879).*

The convictions were based in part upon a written incriminating statement admitted in evidence against the defendant (p. 879). This statement was obtained by agents of the F. B. I. after five days of questioning and after the defendant had been confined for a week in a cell in the F. B. I. field office in Los Angeles (p. 880). During this

* All references to opinions of the Circuit Courts of Appeals are to pages in the bound volumes of the Federal Reporter, Second Series.

period of imprisonment, the arrested man was not taken before a committing officer (p. 880) as required by 18 U. S. C. A. §595 (1894) and 5 U. S. C. A. §300a (1934), set forth above at pp. 21-22 of this brief.

While illegally detained, the defendant sometimes was taken out of his cell to the F. B. I. office for questioning or to a restaurant for meals (p. 880). No bodily harm was inflicted upon him and he was not treated rudely during the questioning (p. 880). Originally arrested after waiving service of a warrant of arrest for violation of the Selective Training and Service Act, the defendant saw neither friend nor counsel during the period he was held in custody by the F. B. I. (p. 880).

The trial in this case took place before the decisions by this Court in the *McNabb* and *Anderson* cases, *supra*, were rendered (p. 880). No objection in the trial court was made by the defendant to the admissibility of his incriminating statement on the ground that it had been obtained by the F. B. I. while he was wrongly under arrest (p. 880). The admissibility of the statement was not even urged as error by the defendant in his brief on appeal (p. 880). The Circuit Court of Appeals for the Ninth Circuit, nevertheless, on its own motion noticed the error committed by the trial court in admitting the incriminating statement and reversed the convictions on the authority of the *McNabb* and *Anderson* cases (p. 881).

In a concurring opinion, Circuit Judge Stephens noted that oral statements made by an illegally detained person to the arresting officers are likewise inadmissible under the rule in the *McNabb* case (pp. 881-882):

> "In my concurrence I wish to point out that the document signed by appellant is not the only evidence received in the case which comes under the ban of McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed.

> The officers who kept guard over the appellant during his restraint engaged him in running conversation, and these officers testified to the admissions made during those conversations. In fact the typewritten-signed document termed the confession is but a narrative form of these very admissions. It is apparent that such conversations are the very source of the confession and therefore must be as objectionable as the confession itself. This is not to be confused with admissions made by accused persons at the time of legal arrest or with admissions or confessions made thereafter in the absence of coercion."

Upon the authority of the *Gros* case, we believe that the oral statements made by the defendant Wendlandt to an agent of the F. B. I. while under illegal detention were as erroneously admitted as the written statement signed by him on July 8, 1942. (See p. 26 of this brief above.)

**F. *United States* v. *Haupt*, 136 F. (2d) 661 (C. C. A. 7th, 1943).**

Six defendants, three men and their respective wives, were indicted, tried and convicted on a charge of treason in this case (p. 663). The alleged treason consisted of giving aid and comfort to a saboteur, Herbert Haupt, who was tried before a military tribunal, found guilty and executed on August 9, 1942 (p. 663). Herbert Haupt was the son of two of the defendants in this case (p. 663). Three of the six defendants, the men, were sentenced to death (p. 663). The three women defendants were sentenced each to twenty-five years' imprisonment and each to pay a fine of $10,000 (p. 663). The convictions of all six defendants were unanimously reversed by the Circuit Court of Appeals for the Seventh Circuit (p. 676).

The Circuit Court of Appeals reversed for the reason, among others, that certain incriminating statements by five of the defendants which had been obtained while the defendants were wrongly imprisoned in violation of 18 U. S. C. A. §595 (1894) and 5 U. S. C. A. §300a (1934) had been admitted in evidence (p. 668). Admission of these statements alone required reversal (p. 671).

Fourteen statements by five of the six defendants were received in evidence at the trial (p. 665). All statements were taken by agents of the F. B. I. (p. 665). Some were taken at the homes of the defendants, some at the F. B. I. offices and some at the village jail in Winnetka, Illinois (pp. 666-667). The defendants were not under arrest at all times when they were being questioned nor at all times when their statements were being taken (pp. 666-667), but each defendant at one time or another was taken into custody by the F. B. I. agents (p. 665). The record does not show when the defendants, or any of them, were taken before a United States commissioner or commiting officer, but it is certain that none was arraigned until after the statements were obtained (p. 665). The contents of the incriminating statements being of a highly prejudicial character, if their admission into evidence was improper, reversal of the judgments of conviction would be required (p. 666).

On appeal the defendants contended that the convictions should be reversed in the light of the *McNabb* and *Anderson* cases (p. 666). The Government contended that those two cases were inapplicable to the case at bar for the reason that in the latter the defendants freely and voluntarily executed written waivers of custody, thus waiving the right to be taken before a committing officer (p. 666). The Circuit Court of Appeals rejected the Government's contention in respect to the asserted waiver by the defendants, holding that the Government had failed to sustain its burden of proving that the waivers had been voluntarily given.

and moreover that the duty imposed by statute upon an arresting officer immediately to take an arrested person before a committing officer could not be waived (p. 671). In connection with the state of the record on the question of the waivers, the Circuit Court of Appeals took the occasion to point out that the test of the admissibility of the statements set forth in the *McNabb* and *Anderson* cases was not squarely before the trial court (pp. 668-669)—a situation similar to that in the instant case.

Ruling that the admission of an incriminating statement against one defendant incriminated all, the Circuit Court of Appeals stated (p. 666):

> "Not only were they incriminating as to the defendant who made the statement, but also as to other defendants, although the jury was told by the court, both at the time of their admission and in its charge to the jury, that they were to be considered only against the defendant making the statement or confession."

Moreover the decision of the Circuit Court of Appeals embraced within its condemnation of the improperly admitted statements, oral as well as the written statements (p. 667):

> "In addition to the written statements admitted in evidence a number of agents testified as to oral statements made by the defendants after they had been taken into custody."

In conclusion the Circuit Court of Appeals indicated that although it disapproved of the decisions by this Court in the *McNabb* and *Anderson* cases, it nevertheless felt compelled to follow those decisions (p. 671):

"With all due deference to the Supreme Court, and especially to Mr. Justice Felix Frankfurter, the author of those opinions, we are constrained to state that we entertain grave doubts that this recently promulgated rule of evidence will result in any improvement to the administration of criminal justice. * * * The Supreme Court, however, has clearly spoken and we must accept its pronouncement."

**G. *United States* v. *Hoffman*, 137 F. (2d) 416 (C. C. A. 2nd, 1943).**

The defendant here was charged with having "unlawfully, wilfully and knowingly" violated Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. A. §311). He was tried and convicted in the District Court for the Eastern District of New York. The Circuit Court of Appeals for the Second Circuit reversed the conviction, and in reversing, pointed out that the District Court had erroneously admitted in evidence certain incriminating statements procured by agents of the F. B. I. from the defendant while he was under arrest but before he was arraigned and that such statements were not admissible against the defendant under the *McNabb*, *Anderson*, and *Haupt* cases (pp. 420-421).

The defendant was arrested on December 23, 1942 by agents of the F. B. I. He was taken to the federal building in Brooklyn and questioned by the government prosecutor, at which time he signed a statement witnessed by an agent of the F. B. I. Thereafter, he gave further statements, on December 24 and December 26, in both instances at the Federal House of Detention in New York City. The record was not clear as to whether the statements were given prior or subsequent to arraignment. Under such a state of the record, the Circuit Court of Appeals presumed they were given prior to arraignment, a presumption similar to that

invoked in the *Haupt* case (p. 665). Contrary to its position taken in the instant case in attributing considerable weight to the alleged voluntary character of the statements involved (R. 1080, 1083), the Circuit Court of Appeals in the *Hoffman* case clearly recognized that "even the voluntary character of statements prior to arraignment does not make them admissible" (p. 421). Moreover, the statements involved in the *Hoffman* case were not direct confessions of the crime charged in the sense of being conclusive as to the defendant's guilt; like the Kunze and Wendlandt statements in the instant case, they were incriminating in that they reflected an attitude toward military service against Germany and her allies which could not fail to arouse intense emotions and prejudice on the part of the jury (p. 421).

No explanation was offered by the Circuit Court of Appeals below for the conflict between its attitude toward incriminating statements obtained from men under arrest and before arraignment in the instant case and its attitude on the same issue in the *Hoffman* case. There was no showing whatever of arraignment "with all convenient speed" in the *Hoffman* case; on the contrary, the defendant there appears to have been held in custody for approximately four days before he was arraigned—almost as long as the period of illegal detention of Kunze in the instant case.

**II. *Runnels v. United States*, 138 F. (2d) 346 (C. C. A. 9th, 1943).**

The defendant in this case, a half-breed Indian ward of the United States, was indicted and convicted in the District Court for the Eastern District of Washington on a charge of murder and was sentenced to be hanged (p. 346).

His conviction was based in part upon written incriminating statements which he had signed and to which he had

sworn (p. 346). These statements were obtained by an agent of the F. B. I. and by a Special Indian Officer, both federal investigating officers, at intervals over a period of seventeen days, during which period the defendant was confined to a cell in the county jail of Yakima County (p. 347). During this period of imprisonment and while the inquisition was in progress, the defendant did not have the help of counsel and the record does not disclose whether he was informed that he was entitled to the advice of counsel (p. 347).

At the end of the seventeen day period of confinement and after the incriminating statements had been procured, a complaint charging the defendant with murder was filed in the office of the United States Commissioner in Yakima (p. 347). Prior to this time, the defendant had not been taken before a committing magistrate and no charge whatever had been filed against him in any court (p. 347).

At the trial, which took place prior to the decisions by this Court in the *McNabb* and *Anderson* cases, the District Court, after satisfying itself that the incriminating statements had not been obtained by coercion, admitted them in evidence and submitted to the jury under appropriate instructions the question as to whether they were voluntary in character (p. 347).

The Circuit Court of Appeals for the Ninth Circuit unanimously held the admission of these statements to have been error and, on the authority of the *McNabb* and *Anderson* cases, reversed the conviction and remanded the case for a new trial (p. 348).

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**I. *Other Decisions on This Point.***

In *United States* v. *Mitchell*, 322 U. S. 65 (1944), the defendant was indicted and convicted in the District Court for the District of Columbia on charges of housebreaking

and larceny (p. 65). His convictions were supported by stolen property seized in his home and by oral confessions (p. 70). Within a few minutes after arriving at the police station to which he was taken by the police officers immediately after his arrest, the defendant orally admitted the housebreaking and larceny and orally consented to have his home searched (p. 69). The Court of Appeals for the District of Columbia reversed the convictions solely on the ground that the admission of the defendant's oral confessions and the stolen property seized in his home constituted reversible error under the *McNabb* case (p. 65). This Court reversed the Court of Appeals on the ground that there had been no disclosure induced by illegal detention, no evidence obtained in violation of any legal rights and the illegal detention of the defendant, without arraigning him, for eight days after the statements were made did not retroactively render illegal the circumstances under which his statements were made.

From the standpoint of the instant case, the *Mitchell* case is significant chiefly because of this Court's unflinching adherence to the *McNabb decision* (p. 68):

> "The *McNabb* decision was an exercise of our duty to formulate policy appropriate for criminal trials in the federal courts. We adhere to that decision and to the views on which it was based."

The circumstances under which the petitioners Kunze and Wendlandt in the instant case were induced to make their incriminating statements, like the circumstances inducing the statements in the *McNabb* case, obviously are wholly different from those which brought about the disclosures by the defendant in the *Mitchell* case. In the first place, of course there is no question arising from the use of stolen property in the instant case. Secondly, the illegal detention

of Kunze and Wendlandt, of which we complain occurred *prior* to the time their respective incriminating statements were taken, not *subsequent* thereto as in the *Mitchell* case. And thirdly, the statements of Kunze and Wendlandt were obtained in direct violation of 5 U. S. C. A. §300a (1934) and 18 U. S. C. A. §595 (1894), whereas there was no violation of any legal rights in obtaining the statement of the defendant in the *Mitchell* case. While the *Mitchell* case is distinguishable on its facts from the instant case, we respectfully submit that, in its reaffirmation of the rule in the *McNabb* case, it squarely supports our position that the judgments of conviction in the instant case should be reversed.

In addition to the federal cases previously discussed in this brief in which the *McNabb* case has been adhered to, there are a great many others, both reported and unreported, in which the decision in the *McNabb* case has been recognized and followed as a landmark in an enlightened administration of criminal procedure in the federal courts. Indeed the Government has contributed materially in this respect by leaving unchallenged and thereby sanctioning the applications of the *McNabb* doctrine in *United States* v. *Haupt*, *supra*, *Gros* v. *United States*, *supra*, and *Runnels* v. *United States*, *supra* (See *United States* v. *Mitchell*, *supra*, at p. 68).

Moreover numerous state courts, while of course recognizing that the rule in the *McNabb* case is not binding upon them, nevertheless have indicated a determination to follow the *McNabb* case and thereby to establish a more civilized standard of conduct in respect to the obtaining and use of incriminating statements in their respective jurisdictions. *Palmore* v. *State*, 12 So. (2d) 854, 856 (Ala. 1943), reversal of first degree murder conviction; *People* v. *Goldblatt*, 383 Ill. 176, 188, 49 N. E. (2d) 36, 41 (1943), reversal of murder conviction; *Cavazos* v. *State*, 172 S. W. (2d) 348,

350 (Texas, 1943), reversal of murder conviction. See also the dissenting opinion (citing and quoting at length from the *McNabb* case) by Chief Judge Irving Lehman of the New York Court of Appeals urging "legislation providing that in the courts of this State, as in the Federal courts, evidence obtained by flagrant violation of the rights of the individual must be excluded". *People* v. *Maliuski*, 292 N. Y. 360, 386, 55 N. E. (2d) 353, 365-367 (1944), cert. granted 13 U. S. Law Week 3141 (October 9, 1944).

**J. *Decision by the Circuit Court of Appeals Below on This Point.***

We believe that the decision below in the instant case, which refused to follow the *McNabb* and *Anderson* cases in this Court, expressly disapproved the *Haupt* case in the Circuit Court of Appeals for the Seventh Circuit and squarely conflicts with the *Gros, Hoffman and Runnels* cases in the Ninth and Second Circuit Courts of Appeals, is open to the following fundamental criticism, briefly summarized:

1. The proposed substitution of the words "with all convenient speed" for the word "immediate" in reference to the arraignment required by 5 U. S. C. A. §300a is contrary both to the letter of the statute and to the fundamental purpose thereof as enunciated by this Court in the *McNabb* case. (See pp. 13-16, *supra*.)

2. The advice to which a man is entitled when arrested, that he need not give a statement unless he desires to and that he is entitled to representation by counsel when making the statement, is advice which should be given by a committing magistrate, not by an arresting officer; under the standard of "con-

venient" rather than immediate arraignment adopted by the court below, such advice prior to the procurement of a statement from the arrested man is effectually precluded. (See pp. 14-16, *supra*.)

3. To the extent that the decision below rests upon the alleged voluntary character of the statements involved (R. 1080, 1083), it is contrary to the *McNabb* case (p. 340). (See p. 16, *supra*.)

4. The excuse advanced by the court below for condoning the delay in arraigning Kunze, that "to expect arraignment on the Fourth of July, or Sunday, would require a promptitude that we do not regard as contemplated by the statutes" is to ignore the command of immediate arraignment in the statute, as well as to overlook the very purpose for which United States commissioners and other committing magistrates are readily available 24 hours every day in the year, including holidays and Sundays, especially in the City of New York. (See pp. 14-16, *supra*.)

5. The attempted justification of the Kunze statement in evidence on the ground that it did not incriminate Kunze in the narrow sense of confessing the crime charged wholly ignores the crucial fact that this statement, full of inflammatory statements of the most prejudicial character, was the most deadly single weapon utilized by the prosecution in its case against the defendants, introduced as the climax of the Government's case; indeed it was far more incriminating in the eyes of the jury than any more direct confession of the crime charged could possibly have been. (See pp. 23-24, *supra*.)

6. The conclusion reached by the court below that the statements in question could not have prejudiced any defendants other than Kunze and Wendlandt in any event represents an unrealistic view in the light of the very design of the Government's case whereby all defendants were closely associated as co-conspirators, especially with Kunze as national leader (See pp. 23-24, supra.) and ignores completely the direct holdings of the *Anderson* case (p. 356) and the *Haupt* case (p. 666) where such incriminating statements have been expressly held to incriminate *all* defendants on trial, despite the instructions by the trial court that such statements apply only to the defendants who made them. (See p. 24, *supra.*)

7. The dismissal as unsubstantial by the court below (R. 1084) of the admission of the oral statements given by Wendlandt to an agent of the F. B. I. while Wendlandt was confined in the Erie County jail in Buffalo on July 8, 1942 (R. 682, 691) without having been arraigned is perhaps the most glaring error in the entire opinion, particularly since those statements constituted a direct confession of the crime charged and had been specifically excluded at Wendlandt's request from the written statements signed by him on that day; the decision by the court below is in direct contravention with the *Haupt* case (p. 667) and the *Gros* case (pp. 881-882) on this point. (See p. 26, *supra.*)

**K. *Summary Under This Point.***

1. By the mandate of Congress, federal officers who make arrests, and agents of the F. B. I. in particular, are directed to take the person arrested before a committing officer, immediately.

2. Statements, oral or written, made by an arrested person while being detained in violation of the aforementioned mandate of Congress, are inadmissible in evidence.

3. On the authority of the decisions by this Court in the *McNabb* and *Anderson* cases, convictions will be reversed when based on written or oral incriminating statements procured by arresting officers in violation of the statute requiring immediate arraignment.

4. The statements given by the defendants Kunze and Wendlandt on July 6, 1942 and July 8, 1942, were procured by agents of the F. B. I. while the defendants were under arrest and before they were taken before a committing officer.

5. The admission into evidence over the objection of counsel for the defendants of the aforementioned statements of the defendants Kunze and Wendlandt, therefore, constituted reversible error, even though the statements may have been voluntarily given.

6. The admission of the statements by Kunze and Wendlandt into evidence incriminated all the defendants on trial. The convictions of all petitioners accordingly should be reversed.

7. The decision by the Circuit Court of Appeals below not only is contrary to the decisions of this Court and in conflict with decisions of other Circuit Courts of Appeals, but gives sanction to the abridgement of rights of an arrested man which this Court has unambiguously stated must be protected in accordance with the clear mandate of Congress.

## POINT II.

### The defendants did not have a fair trial.

This point will be supported upon two grounds which must be discussed separately but which in its deliberations the Court is requested to evaluate together. Prejudicial actions repeated during a trial mount in effect not by arithmetic but by geometric progression. A single prejudicial factor perhaps may be minimized by a precautionary instruction. Nevertheless, it has carved a channel into the minds of the twelve jurors which allows a second prejudicial factor, when presented, to penetrate deeper into their consciousness. Perhaps at this point, also, the judicial scalpel of a clear and vigorous charge can still excise the resulting mental and emotional growth. But add a third, a fourth, and continue until you have built up the score *as in this case* to a total of *three hundred and fifty six* prejudicial factors, and heap upon this *as was done in this case* a press broadside from Washington, from a high official of the federal government, discussing two of the defendants by name and all of them by description, touching the very issues on trial, and introducing material which no court without obvious error could have received in evidence—cumulate the prejudice to such a degree and it becomes wholly impossible for the jurors in fact to heed the most cogent charge to disregard its effect.

The approach which is here suggested is that of Justice Anderson, in *Colyer* v. *Skeffington*, 265 Fed. 17 (D. C. Mass. 1920), reversed as to two of the petitioners in *Skeffington* v. *Katzeff*, 277 Fed. 129 (C. C. A. 1st, 1922). The case involved a petition for *habeas corpus* brought by or on behalf of twenty communists who, shortly after the first World War, had been ordered deported. The court's approach has been succinctly stated in Gellhorn, Administrative Law (1940) 546:

"An example of judicial evaluation of a whole case, rather than of a single part of it, is Colyer v. Skeffington. * * * Here we see a judge tracing the entire story of the proceeding and concluding that the chronicle is one of vitiating unfairness. One cannot with assurance rest his finger on a particular element of the unfairness and say, *'There* is the vice'; it is the atmosphere of the whole which establishes the unfairness of its several parts."

**A. A Fair Trial was Denied because of the Receipt in Evidence of an Unreasonably Excessive Number of Prejudicial and Inflammatory Exhibits Having No Direct Bearing Upon the Offense Charged.**

"During the trial, in the presence of the jurors, there were marked for identification 356 exhibits (virtually all of which were admitted in evidence) which were undoubtedly prejudicial and inflammatory. The learned trial judge conceded (R. 53) on the second day of the trial, when but sixteen of the exhibits had been presented, that

"* * * it is entirely true that it is quite possible that evidence which may be introduced here showing pro-German sympathies, pro-Hitler activities, if there be such evidence, of this organization and these defendants may be calculated to some extent to prejudice the jury on the trial of this case. * * * I regret to say that it is possible, certainly possible that it may tend to prejudice the jury."

Nevertheless, the trial judge admitted such evidence on the theory that it was material and pertinent to the issues of the case.* The prejudicial effect stands virtually conceded by the trial judge, and it is submitted that the overwhelming

* See also the trial judge's statement on the same point, R. 23-24.

majority of the exhibits, largely cumulative, had no tendency whatsoever to prove the crime charged.

Throughout the trial the objection was repeatedly urged, and as consistently overruled, that such evidence would create a hostile atmosphere, inflame the minds of the jurors, and deny the defendants a fair trial.* The objections were emphasized at the close of all the evidence, by motions for mistrial and motions to strike such evidence, based upon the propositions, first, that it lacked probative force to establish the conspiracy charged; and secondly, that its multiplication had so prejudiced the defendants that the jurors had lost sight of the charge and hence a fair trial was impossible (R. 805-810).

The issue presented by this Point is vitally important in any trial where the background evidence is of a peculiarly prejudicial type. It cannot be contended that a bust of Hitler, or a swastika on an ash tray, or a lady's handkerchief bearing a symbol "A. V.", tended directly to prove the alleged conspiracy. The Government's brief in the Circuit Court of Appeals is not entirely clear as to the theory on which the evidence is asserted to be admissible, but it appears to rest upon the proposition that circumstantial evidence is admissible to show "appellants' adherence and allegiance to Germany". (Govt. Brief, Circuit Court of Appeals, 39). Of course the defendants were not on trial for "adherence

* Complete tabulation of the many objections would serve no useful purpose. Typical instances are found in the Record at pp. 23, 24 (to Constitution of Bund); 49 (to pictures of various persons at Bund Headquarters); 57 (to Bund flag); 59 (to the several items of an O. D. uniform); 103 (to pictures of Bund National Conventions for 1937, 1938 and 1939); 375 (to numerous exhibits, including two pennants with swastika, banner with swastika, lady's handkerchief with symbol A. V., and four photographs of Hitler); 444 (to various papers and pamphlets dating back to 1936); 547 (to a bust of Hitler, and an ash tray with swastika); 673 (to flags, bust of Hitler, and numerous other objects); 730 (to several items, including pictures of Hitler and articles of clothing).

and allegiance to Germany". That would be the issue in a denaturalization proceeding or a prosecution for treason. It is significant that *many, if not all, of these Exhibits were later used in evidence in the Bund denaturalization proceeding* (Govt. Brief in Circuit Court of Appeals, page 6, footnote).

The degree to which circumstantial evidence, even when admissible, may properly be cumulated, is not capable of quantitative measurement. As expressed by the late Dean Wigmore (6 Wigmore, Evidence (3rd ed., 1940) 574, 575):

> "Circumstantial evidence, concededly relevant, may nevertheless be excluded by reason of the general principle * * * that the probative usefulness of the evidence is more than counterbalanced by its disadvantageous effects in confusing the issues before the jury, or in creating an undue prejudice in excess of its legitimate probative weight. In either case, its net effect is to divert the jury from a clear study of the exact purport and effect of the evidence, and thus to obscure and suppress the truth rather than to reveal it.
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> * * * * * *
>
> 1. *Confusion of Issues.* This consideration operates potentially throughout the whole realm of circumstantial evidence. It is given positive effect chiefly where the evidence consists of *particular facts of human conduct* or *external events* which are of themselves only minor and additional and are not the sole mode of proof for the matter in issue. Moreover, even in these cases, effect is given to it usually only when the other principles of Undue Prejudice (*infra*) and of Unfair Surprise * * * combine at the same time to accumulate an overweight of disadvantage in using the evidence.
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> * * * * * *

2. *Undue Prejudice.* This consideration, like the preceding one, is found operating potentially throughout the realm of circumstantial evidence; and, like the preceding one, it is found mainly in its positive effects where the other principles of Confusion of Issues (*supra*) and of Unfair Surprise (ante, §§1845, 1849) combine also to oppose the use of the evidence. Nevertheless, it has effect also in some marked instances where neither of the others has any bearing."

It therefore is not necessary for petitioners to stand upon the proposition that *none* of the circumstantial evidence was admissible, though it is submitted that it could be demonstrated that most of the items admitted were in fact not relevant.* The convictions should be reversed because the multiplication of the prejudicial evidence was carried

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* In *United States* v. *Coffman*, 50 F. Supp. 823 (S. D. Calif. 1943), Judge Yankwich, in granting a motion to suppress certain evidence in a criminal prosecution for allegedly "unlawfully counseling, aiding and abetting registrants under the Selective • • • Service Act to evade service" in the armed forces, says (p. 826):

"• • • It is quite evident that most of the objects seized could not be used as evidence in the case. For certain it is that letters and documents showing participation by the defendant in anti-war, anti-administration, anti-Jewish, and anti-Catholic agitation or membership in the Ku Klux Klan or in Coughlin's Anti-Jewish Social Justice Movement—even if brought down to the date of the indictment—do not relate to the offenses with which he is charged. They do not have any bearing whatsoever upon what the arresting officer called the defendant's 'state of mind'. The wilfullness required of one who counsels, aids and abets another to evade service in the land and naval forces of the United States is not a general ideological opposition to war, which many men in and out of the Congress maintained up to America's entry into the war, but the evil design to do the particular act denounced by Section 311, Title 50 U. S. C. A. Appendix. See: United States v. Murdock, 1933, 290 U. S. 389, 394, 395, 54 S. Ct. 223, 78 L. Ed. 381; Spies v. United States, 1943, 317 U. S. 492, 495-499, 63 S. Ct. 364, 87 L. Ed. • • •".

to such an immoderate extreme that the probative value, if any, was lost in the process. This is a well recognized ground for the exclusion of evidence (1 Wigmore, Evidence (3d ed. 1940) 441):

> "A circumstantial fact may be logically relevant, and thus far admissible, and yet may be excluded because it is obnoxious to some consideration of Auxiliary Probative Policy, in particular, those of Confusion of Issues, or Unfair Surprise, or Undue Prejudice."

And the distinguished author further points out (p. 412) that

> "• • • the moral disposition of an accused may be probatively of considerable value as indicating the probability of his doing or not doing a particular act of crime, yet it may be excluded because of the *undue prejudice* liable to be caused by taking it into consideration; for its probative value may be exaggerated, and condemnation be visited upon him, not for the act, but virtually for his character • • •"

Dean Wigmore quotes from numerous cases, including,

*Mattison* v. *State*, 55 Ala. 224, 232 (1876):

> "On the other hand, undue multiplication of the issues is to be steadily guarded against, as tending to divert the minds of jurors from the main issue."

*Commonwealth* v. *DiStasio*, 294 Mass. 273, 1 N. E. (2d) 189 (1936), cert. den. 302 U. S. 683 (1937):

> "There is no constitutional right to introduce all evidence that may be logically relevant • • • Con-

siderations of social policy and practical expediency long ago produced a number of rules excluding from consideration facts which logically have some probative force."

Though evidence of bad character is unquestionably "relevant", all such testimony against a defendant is excluded because of "the policy of avoiding the uncontrollable and undue prejudice, and possible unjust condemnation, which such evidence might induce." (1 Wigmore, 454, citing numerous cases. See also 1 Wigmore, 646-652, for additional citations.) Note on page 456 this pertinent remark:

"The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court * * *"

and again on page 646:

"The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge."

Circumstantial evidence admissible to prove design, motive, intent, and similar issues—not contended to be the basis of admission in the instant case— thus properly comes in *only up to that point at which its further cumulation would create undue prejudice; at that point it must stop, or reversal follows.*

Applying these fundamental principles, it seems clear that in the instant case a fair trial was impossible under

the impact of the multiplied exhibits. It is impossible to recreate from the Record the atmosphere of the trial, but an imperfect picture can be drawn:

The first witness took the stand on the morning of September 22, 1942 (R. 22). The government presented sixty-six witnesses, the testimony of the last one being concluded on the afternoon of October 13th (R. 798). Allowing for holidays, Saturdays and Sundays, introduction of the evidence consumed most of fifteen days. During these fifteen days, 356 exhibits were marked for identification before the jury, and almost all were admitted, though some were stricken later by a blanket oral statement to the jury which failed to identify the items which the jurors were thereafter not to consider, save by the vague description as "certain Bundist paraphernalia and documents and material taken from the home of the defendant Borchers by the witness, F. B. I. agent Smith, and *some of the material* taken from the home of the defendant Weiss by the witness, F. B. I. agent Jenkins." (R. 853, emphasis supplied.) The vagueness of this instruction is evidence that the trial court recognized its futility. No juror could have exercised the impossible mental acuteness necessary to understand that he could no longer consider Exhibits 19-23 introduced on September 22nd (Shirt, pants and other parts of uniform; R. 58-59); Exhibit 30 introduced September 23rd (O. D. membership card, R. 67); and the numerous exhibits admitted September 30th (R. 373-379) which included a Nazi party program *for the year 1934*, a lady's handkerchief bearing the symbol A. V., pennants, flags, and photographs of Hitler. But even had the jurors possessed the unbelievably keen minds necessary to obey the instruction regarding Borchers, they were not given the basis for applying their ability to the exhibits taken from Weiss, since only *some* of these were withdrawn. It unquestionably was the knowledge of this fact that let the trial judge to recognize the uselessness of additional detail in his instruction.

Included in these exhibits displayed before the jury and introduced at the trial were:

Sixteen pictures of Hitler (Exs. 159-162, 215, 222, 258, 259, 301, 322, 333-335, 337, 348, 349)

Two busts of Hitler (Exs. 249, 301)

Two photos of other German leaders (Exs. 329, 346)

Ten flags, banners, or pennants (Exs. 17, 171 (2), 172, 240, 241, 247, 248, 325, 326)

Sixteen articles of uniforms (Exs. 19-23, 212, 213, 228, 251, 257, 307, 345, 347, 351-353)

Twelve song books (Exs. 152, 211 (9), 236, 254)

Eight metal objects—pins, ash tray, etc., usually showing swastika (Exs. 18(2), 229, 250, 253, 255, 306, 336)

One lady's handkerchief though there was not one female defendant (Ex. 173)

Seven rubber stamps (Exs. 168-170, 208, 234, 245, 246)

Numerous pamphlets, programs, booklets, etc. dating back as far as 1936.

The case was tried at a time when the country was at war with Germany. Hardly a day passed without some of the inflammatory exhibits being brandished before the jury. Flags and uniforms were unfurled constantly. Thus in a war setting the government deliberately and over constant and repeated objection piled cumulative exhibit upon cumulative exhibit, not for the purpose of establishing the conspiracy charged, but as it declares, to show "appellants' adherence and allegiance to Germany." Such a deliberate course was calculated to confuse the issues, to prejudice the jurors, and necessarily to result in the denial of the fair trial to which the defendants were entitled.

Voluminous evidence similar in character to that admitted at the trial of the instant case was introduced at the trial of Anthony Cramer for treason in the District Court

for the Southern District of New York and was expressly approved by the Circuit Court of Appeals for the Second Circuit in *United States* v. *Cramer*, 137 F. (2d) 888, 897 (C. C. A. 2nd, 1943). This Court granted certiorari in the *Cramer* case on November 8, 1943 and, after the case was argued in this Court on March 9, 1944, entered an order on May 22, 1944, directing that the case be reargued in this Court at the October 1944 term.

**B. The Release to the Newspapers of an Inflammatory Press Release by the Department of Justice Denied to Petitioners a Fair Trial upon the offense Charged.**

On October 5, after the case had been on trial for some two weeks, there appeared in the *New York Times* and other metropolitan papers stories based upon a press release issued by the Attorney General on October 4, 1942.*

The situation at the time should be viewed as a whole. For nearly two weeks the jurors had been pounded with evidence about the Bund. Before the court adjourned on the afternoon of October 2, some 250 exhibits had been marked and all except a few had been put in evidence. In this setting, the jurors received their newspapers, which contained the summary of the Attorney General's release. From it they presumably learned that proceedings would be brought to denaturalize all former leaders of the Bund "whose citizenship was obtained by false representations." Also proceedings would be brought against naturalized citizens whose Bund activities indicate fraud in their oath of allegiance to the United States.

* The *New York Times* story is set forth as Appendix B of this Brief. The full press release was set forth as Appendix B in our petition for certiorari (No. 821, October Term, 1943) in this case, to which the attention of the Court is respectfully directed.

Also that for eighteen years the Bund and its predecessor organizations had been engaged in anti-American activities. (Note that the trial judge had strictly limited any evidence as to predecessor organizations (R. 24).)

Also that the Department was "moving at once to clean out this source of danger to our national security."

Also that Gerhard William Kunze, one of the defendants on trial, "has been sentenced to fifteen years' imprisonment for espionage; a charge, it was shown at this trial, directly related to his Bund activities."

The possibility of prejudice from newspaper stories was an obvious risk during this trial. At its outset, defense counsel moved that the jurors be instructed not to read newspaper accounts. The trial judge not only refused to instruct the jurors not to read such accounts, but indeed said *in the presence of the jurors* (R. 21):

> "I think, Mr. Kiendl, that it is rather futile for me to admonish this jury not to read the newspapers * * * I mean newspaper accounts of this case. I am going to read the newspaper accounts, and I do not like to deliver an admonition which I do not think will be carried out."

He then turned to the jurors, told them it was better that they not read the newspapers, but said: "* * * if your natural curiosity is too strong for you * * *" do not allow what you read to influence you (R. 21). Mr. Kiendl's remark that this instruction was satisfactory was made nearly two weeks before the Attorney General's release and, at most, can be construed only as a comment upon the instruction as related to the subject under discussion: "newspaper accounts of this case." Though numerous such accounts appeared, many of them highly objectionable (witness the blast in the tabloid *Daily News* for October 15, 194[illegible] entitled "Bund

Leaders Toss in Sponge at Draft Trial," Defendant's Exhibit J, R. 852, constituting a clearly improper comment on the failure of the defendants to take the stand), this second phase of our contention that the petitioners did not have a fair trial is based principally upon the Department of Justice release. Such an objectionable release was not waived by Mr. Kiendl's remark.

The issue therefore is not whether a biased account of a lay reporter distorting the story of the proceedings in a trial will justify or demand a new trial. There is ample authority for an affirmative answer to that inquiry, and some of the cases are cited below. Rather, the issue here is much more important and crucial:

*May a government official responsible for the prosecution, whether he acts deliberately or merely negligently, place before the jurors improper and prejudicial matter by means of newspapers, and escape the penalty of reversal which would be inflicted upon him if he gave the jurors the same information in court?*

It is submitted that in any jurisdiction wherein the courts propose to maintain the tradition that even the most despicable are entitled to a fair trial on the offense charged, the answer must be "NO".

Such an answer compels reversal in this case.

An almost identical situation was before the court in *Meyer* v. *Cadwalader*, 49 Fed. 32 (C. C. E. D. Pa. 1891). There the newspaper reported an interview of a Treasury agent who participated in the trial. The Treasury agent was quoted as stating that "I am only too glad to give my views, as I think that the people should know all of the facts in this attempt to loot the United States Treasury." The court granted a new trial and said: "It is idle to say that there is no direct evidence to show that the jury read

these articles. * * * The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications."

Another closely analogous case is *Harrison* v. *United States*, 200 Fed. 662 (C. C. A. 6th, 1912), wherein the defendant was charged with using the mails to defraud. While the trial was in progress, the Post Office Department promulgated a fraud order against him relating to the same general transaction involved in the trial. "* * * this fact was prominently published in the Cincinnati newspapers, and so presumably came to the jury's attention" (p. 669). While conceding that the release and publication at a particular time and in such a way "as to have the most prejudicial effect upon the respondent before the jury" was merely an "unfortunate coincidence," yet the court held that "it was of itself sufficient to make impossible that fair trial to which every respondent is entitled."

Still another similar case is *Griffin* v. *United States*, 295 Fed. 437 (C. C. A. 3rd, 1924), wherein the newspaper account was based upon a release by the Prosecuting Attorney concerning an offer of several defendants, on trial for conspiracy, to turn state's evidence, which the Prosecuting Attorney stated he had refused. In granting a new trial the court made the following pertinent statement which, with the changes marked in brackets, appears applicable to the instant case:

> "The United States Attorney [*The Attorney General of the United States*] and his assistants are officers of the court, holding quasi judicial positions. It is their recognized duty, not only to prosecute the guilty, but also to protect the innocent, and any statement made by them as to the guilt or innocence of a defendant on trial has considerable weight with the jury."

See also *United States v. Montgomery*, 42 F. (2d) 254 (S. D. N. Y. 1930).

At the time the motion to withdraw a juror was made in the instant case, the trial court merely repeated its instructions to the jury not to be influenced by what it read in the paper (R. 489). Nine days later the court examined the jurors *in camera* and was assured they had read nothing "which has in any way influenced them nor prejudiced them in the trial of this case" (R. 845). The clear implication from the court's statement is either (a) that it assumed the jurors had read the accounts, and did not inquire whether in fact they had done so; or (b) that on inquiry it learned that they had read the papers, but that they declared themselves uninfluenced thereby.

Few proceedings could be more futile than this: a trial court several times instructing the jurors that they should not allow anything they read to influence them, and then—at the end of the long trial—asking them whether what they have read would influence them. The replies which the jurors would make could have been recorded before they were spoken: obviously they will affirm their untarnished rectitude. And the greater the bias the juror has absorbed, the more firmly will be his impartiality. Should his animosity move him deliberately to evade the question or falsely to deny his prejudice, he will be reassured by the obvious impossibility of his victim's disproving his statement, and will be further tempted by the knowledge, derived from the prior instruction of the court, that a confession of the prejudice will deprive him of the opportunity to implement it by a verdict of guilty. On the other hand, should he be, as the great majority of jurors of course are, anxious to be fair with the court, his own exaggerated conception of his impartiality is likely to lead to a denial of his prejudice. The common experience of mankind demonstrates that no one is more profuse in his declarations of disinterest, of im-

partiality, of the ability to see both sides, than is the individual, man or woman, blessed with inflexible opinions upon the subject under discussion.

It is for this reason that it is established by the weight of authority that jurors in criminal cases shall not be allowed to remove the taint of misconduct or other prejudicial acts by their declarations, no matter how positive, that they can disregard the incident or that it will not prejudice them. In the following cases, among others, this rule has been applied where the improper conduct was the perusal of prejudicial accounts in newspapers:

*United States* v. *Ogden*, 105 Fed. 371 (E. D. Pa. 1900);

*People* v. *Chin Non*, 146 Calif. 561, 80 Pac. 681 (1905).

See also:

*State* v. *Lilja*, 155 Minn. 251, 193 N. W. 178 (1923);

*Hempton* v. *State*, 111 Wis. 127, 86 N. W. 596 (1901).

And in *Mattox* v. *United States*, 146 U. S. 140, 149 (1892), in passing on a compiaint involving improper newspaper publications, the court quoted as "conformable to right reason and sustained by the weight of authority" the rule given in *Woodward* v. *Leavitt*, 107 Mass. 453 (1871):

> "* * * a juryman may testify as to any facts bearing upon the question of the existence of any extraneous influence, *although not as to how far that influence operated upon his mind.*" (Emphasis added.)

The application of the rule is discussed as applied to various types of prejudicial factors in the annotation in

93 A. L. R. 1442, at 1449, appended to the report of *State* v. *Lindeman*, 64 N. D. 518, 254 N. W. 276 (1934). The rule is enforced in *United States* v. *Pierce*, 13 F. Supp. 301 (W. D. Tenn., 1936).

C. *Summary Under This Point.*

In view of the unreasonably excessive number of prejudicial and inflammatory exhibits admitted at the trial having no direct bearing upon the crime charged in the indictment and in view of the inflammatory press release given by the Department of Justice to the newspapers during the trial, both of which we ask the Court to evaluate together, the defendants were denied the fair trial to which they were entitled and which was the paramount concern of counsel assigned to represent the defendants.

## POINT III.

**The Circuit Court of Appeals erred in approving the District Court's charge to the jury that the defendants' intention to bring a test case to determine the constitutionality of Section 8(i) of the Selective Training and Service Act of 1940 was immaterial to the guilt or innocence of the defendants.**

A. *The Charge.*

In the final three paragraphs of his charge (R. 1020-1021), the trial judge took from the jury entirely the right to consider the main defense of the defendants, namely, that their sole purpose in preparing, distributing and making known the contents of Bundesbefehl No. 37 was to urge upon any person in a proper position to do so to bring a test case to determine the constitutionality of the discriminatory provision set forth in Section 8(i) of the Act.

Counsel for the defendants duly excepted (R. 1021), pointing out that the charge was tantamount to a direction of a verdict of guilty.

The Government asserted that the defendants were in fact conspiring to counsel others to evade service and that their claim that they were merely trying to have someone test the constitutionality of Section 8(i) was a subterfuge. The defendants asserted that their intention was entirely bona fide. Thus there was joined the issue as to the intent of the defendants in seeking to test the constitutionality of this plainly discriminatory provision in the Act and this issue was the principal one tried before the jury.

The only Government evidence bearing directly on the charge of the indictment was to the effect that Bundesbefehl No. 37 had been read or otherwise made known by almost all the defendants to their respective local units. The balance of the Government case consisted of the various inflammatory exhibits bearing no relevance whatever to the specific charge set forth in the indictment. Bundesbefehl No. 37, according to the testimony of the Government translator (R. 76-79), could fairly and correctly mean in English that a test case of Section 8(i) should be brought.

It is submitted that if the defendants' assertion was true, if their sole aim was to have the unfair distinction between themselves and other American citizens tested in the courts, then at least they were entitled to have the jury consider whether that was their true intention, and if so, whether it constituted the crime with which they were charged. This was the issue and the main issue which the evidence presented to the jury.

In this situation the trial judge instructed the jury in effect that there was no such issue. In a criminal trial, and especially where the sole charge is one of conspiracy, the very essence of which is the element of intent, an instruction of this character constituted fundamental error.

**B. *Evidence as to Intent.***

The undisputed evidence shows that everyone connected with the Bund was in favor of the Selective Service Act as passed (R. 210-214) and the only opposition to the Act which ever arose was to the discriminatory provision in Section 8(i) (R. 210; Exhibit C), set forth at p. 6, *supra*, of this Brief. This Section first appeared in the Act on September 7, 1940 (R. 210-211). Luedtke, the main government witness, testified that until this discriminatory clause appeared in the Act he never heard a unit leader express any opposition whatever to compulsory military service (R. 210-215). That even its sponsor had serious misgivings as to its constitutionality is borne out by the following statement by Representative Mundt on the floor of the House of Representatives at the time he introduced Section 8(i) as an amendment to the Selective Training and Service Act (Exhibit C):

> "We all know that constitutionally we cannot make this mandatory, but we can certainly set it up as the established policy and as the desire of this Congress that industry and business shall place these vacancies with good, loyal American citizens."

Luedtke testified that it was the position of the Bund from top to bottom that compulsory military service was a good thing for the country (R. 276) and that all leaders of the Bund, to Luedtke's knowledge, were in favor of compulsory military service (R. 274-275). The issue of *The Free American* which appeared on August 15, 1940, before the obnoxious clause was added, stated that "Selective Service could make our nation great and strong" (Exhibit 14b). In the discussions preceding the passage of the Act, the Bund and its leaders had favored a limitation upon the use of the

army so that it would be used on American soil only (R. 266). Similar discussions on this topic took place throughout the country even long after the Act originally was passed (R. 272-273). The viewpoint of the Bund in this respect was substantially vindicated by the enactment of Section 3(e) limiting the use of American troops to the Western Hemisphere, except that they could be used elsewhere in territories and possessions of the United States (50 U. S. C. A., §303(e) (1940)).

Moreover *The Free American* always favored compulsory military service and never took a position in opposition to the Act until Section 8(i) was inserted depriving members of the Bund of their right to employment in business and industry (R. 215).

Following the insertion of Section 8(i) in the bill then under consideration, on September 7, 1940, however, pressure was exerted, and rightly so, by leaders of the Bund to secure its exclusion from the bill. Two telegrams were sent by Kunze on September 15, 1940—one to the Congress and one to the President—urging that the bill be defeated or vetoed because of the discriminatory Section 8(i). In a letter addressed to the President on September 15, 1940, Kunze asked that the bill be vetoed "in view of its denial of civil liberties to the German American citizens" (Exhibit 138). An eight-column headline appearing in *The Free American* on September 19, 1940, three days after the Act, including Section 8(i), was enacted, read, "No Civil Liberties—No Military Duty" (Exhibit 137). In the same issue of *The Free American*, on page 2, there appeared an article entitled "German Americans Deprived of Their Constitutional Rights By the Draft Act," the point of this article being that a serious constitutional question was raised by Congress' enactment of the conscription act "with the clause depriving members of the German American Bund of their

civil rights to be employed in government plants" (Exhibit 137).

Having sought in vain to persuade the legislative and executive branches of the government to protect the rights of citizens being trespassed upon (R. 110), leaders of the Bund, in a perfectly forthright way, then decided to resort to the judiciary as the last remaining citadel. Accordingly on October 31, 1940, Bundesbefehl No. 37 (Exhibit 73) was issued and distributed to the unit leaders (R. 82-83). A fair translation of the crucial portion of paragraph four of Bundesbefehl No. 37, according to the Government's translator, Warner, is as follows (R. 77-79):

> "Anyone, in a proper case, who can take it upon himself should refuse to render military service until this law and all other laws of the country or the states which confine the citizenship rights of Bund members are revoked.
>
> We will fight a test case in court on this subject."

Late in September of 1940 there was a meeting of the unit leaders at Kreutzer Hall, 228 East 86th Street, New York City (R. 231), at which the Bund attorney, Keegan, advised that the discriminatory clause of the Act, Section 8(i), could be tested in a case brought in court (R. 232). Luedtke, who was present, testified that Keegan spoke of the constitutional question involved in the discriminatory section of the Act, said that it was incumbent upon members of the Bund to protect their rights and that the Bund as a fighting organization must take it upon itself to correct the discrimination embodied in the Act (R. 110, 232).

On the basis of what transpired at the unit leader meeting at Kreutzer Hall, Luedtke testified that he firmly understood from Kunze and Keegan that it was to be the policy of the Bund to go into court and ascertain whether Section

8(i) of the Act which discriminated against members of the Bund in respect to their right to be employed in business or industry might be repealed (R. 235). According to Luedtke, neither Kunze nor Keegan said or suggested in words or in substance that members of the Bund were to resist military service irrespective of what happened in this test case (R. 235). The policy of the Bund was, not to counsel any body to evade military service, but to try to get the discriminatory provision out of the Act (R. 235).

In this state of the record, absolutely undisputed and uncontradicted, there cannot be the slightest doubt that the defendants had one intention and only one in preparing, distributing and making known to others the contents of Bundesbefehl No. 37, namely, to obtain the exclusion of Section 8(i) from the Act by means of judicial review of the Act, provided a person or persons in a position to bring a test case could be found. There is not one shred of evidence in the record even to suggest that the test case proposed by the Bund might have been a "subterfuge to divert attention from their real purpose," as the trial judge in the closing words of his charge to the jury suggested (R. 1021):

> Indeed few things are better established in our jurisprudence than that any citizen is privileged, if he chooses and is properly qualified, to test in the courts the constitutionality of a legislative act which threatens his rights. Such procedure is basic to our system of government. An outstanding authority in the field of constitutional law affirms this principle. Willoughby, Constitution of the United States (1929) 17.

It should be noted that the case at bar is not the test case which the defendants sought to bring to determine the constitutionality of Section 8(i) of the Act. The instant case is a prosecution against the defendants for having *attempted* to bring a test case to determine the constitutionality of the discriminatory section. The Government thus seeks by

means of this prosecution to impose a penalty upon those who would *attempt* to determine the constitutionality of an act of Congress just as severe as the penalty which would have been imposed had a test case in fact been brought and determined adversely to the party seeking the test.

Moreover, something of the difficulty involved in attempting to determine the constitutionality of a legislative act other than by resistance giving rise to a test case, may be seen in efforts which have been made to test the validity of criminal statutes by the declaratory judgment device. *Reed v. Littleton*, 275 N. Y. 150, 9 N. E. (2d) 814 (1937); *International Mutoscope Reel Co., Inc. v. Valentine*, 247 App. Div. 130, 286 N. Y. S. 806 (App. Div., 1st Dept., 1936) aff'd. 271 N. Y. 622 (1936). See also Borchard, Declaratory Judgments (2nd ed. 1941) 1023, 1032.

Least of all has the Government succeeded in establishing that the defendants in the case at bar, by planning to bring a test case, demonstrated a corrupt intent sufficient to invoke the statute under which they were indicted.

### C. *Law in Respect to Criminal Intent.*

The statute under which the defendants were indicted made it a crime *knowingly* to counsel, aid or abet another to evade registration or service in the land or naval forces (50 U. S. C. A. §311 (1940)). Accordingly in order to make out a case of conspiracy under this statute, the Government was required to establish beyond a reasonable doubt that the defendants were possessed of an unlawful or corrupt intent to conspire to counsel others to evade service in the armed forces.

Criminal intent is an essential element of the crime of conspiracy which the Government was required to prove. Where the object of the conspiracy is not innocent in itself, the necessary criminal intent will be presumed, but where

as here the object of the alleged combination or the means by which that object was to be attained were innocent in themselves until made unlawful by statute, the criminal intent of the participants in the combination will not be presumed. The Government had the burden of proving either that the defendants had a corrupt motive or that they knew that the acts they combined to commit were illegal.

In *Laaden v. United States*, 299 Fed. 75 (C. C. A. 6th, 1924), reversing a conviction for a conspiracy to violate the National Prohibition Act by selling intoxicating liquor without the necessary permit, the Court said (p. 78):

> "It is settled that with regard to criminal prosecutions for those acts which are not mala in se, but which through legislative exercise of the police power have become mala prohibita, no conscious intent to break any law is essential. The respondent need not even know that the law exists. (Citations.) When, however, the prosecution is for conspiracy, the text-books and elementary discussions seem to agree that there must be a 'corrupt intent,' which is interpreted to be the mens rea, the conscious and intentional purpose to break the law. Bishop's Criminal Law (8th Ed.) §§297, 300; 12 C. J., p. 552, §16; 5 R. C. L. p. 1066, §6. * * * The principle was applied to conspiracy in People v. Powell, 63 N. Y. 88, 91, 92. In a careful opinion by Judge Andrews, the difference between the intent involved in the substantive offense, which intent the law will imply from the act, and the 'corrupt intent' necessary to make conspiracy, which intent does not necessarily follow from a plan to do the act, is clearly pointed out. The case has stood for 50 years as the leading one on the subject, and if it be confined as it is (p. 92) to a plan to do an act 'innocent in itself', it has never, so far as we find, been questioned."

In the leading case referred to in the opinion just quoted, *People* v. *Powell*, 63 N. Y. 88 (1875), a distinction is made as to whether the act which is the unlawful object of the conspiracy is *malum in se* or *malum prohibitum*. In that case the Court of Appeals reversed the conviction of three commissioners of charities for Kings County, who were indicted for conspiring to omit, refuse and neglect to advertise for supplies as required by statute. The trial judge had instructed the jury that regardless of the defendants' ignorance of the statute their agreement in violation of it followed by conduct in furtherance of the agreement justified conviction. In holding this to be error, the Court, through Judge Andrews, said (pp. 91-92):

> "I think this ruling cannot be sustained. The general rule is, that to constitute crime there must not only be the act but also the criminal intention; and these must concur, the latter being equally essential with the former. (Grover, *J.*, in *Stokes* v. *People*, 53 N. Y., 179), and the intent is to be found by the jury. But where a man is indicted for doing a prohibited act, he will not be allowed to say that he did not know of the existence of the law he had violated. The offence in cases of acts *mala prohibita*, is complete when the act is intentionally done, irrespective of any actual intention to violate the law. * * * But to make an agreement between two or more persons, to do an act innocent in itself, a criminal conspiracy, it is not enough that it appears that the act which was the object of the agreement was prohibited. The confederation must be corrupt. (3 Greenl. Ev., 75.) The agreement must have been entered into with an evil purpose, as distinguished from a purpose simply to do the act prohibited in ignorance of the prohibition. This is implied in the meaning of the word conspiracy. Mere concert is not conspiracy.

> Persons who agree to do an act innocent in itself, in good faith and without the use of criminal means, are not converted into conspirators, because it turns out that the contemplated act was prohibited by statute. The actual criminal intention belongs to the definition of the offence, and must be shown to justify a conviction for conspiracy. The offence originally consisted in a combination to convict an innocent person by perversion of the law. (3 Inst., 143; 1 Hawkins, 446, note.) It has since been greatly extended, but I am of opinion that proof that the defendants agreed to do an act prohibited by statute, followed by overt acts in furtherance of the agreed purpose, did not conclusively establish that they were guilty of the crime of conspiracy."

In a later case, *People* v. *Flack*, 125 N. Y. 324, 26 N. E. 267 (1891), the Court of Appeals, speaking through the same Judge, reaffirmed its earlier position. In reversing a conviction for conspiracy falsely to institute and maintain divorce proceedings in the name of the wife of one defendant without her knowledge, the Court said (p. 333):

> "* * * The mere fact that the conspiracy has for its object the doing of an act which may be unlawful, followed by the doing of such act, does not constitute the crime of conspiracy, unless the jury find that the parties were actuated by a criminal intent. In many cases this inference would be irresistible, in others the jury might find that, although the object of the agreement and the overt act were unlawful, nevertheless the parties charged acted under a misconception or in ignorance, without any actual criminal motive. If that conclusion should be reached by the jury, then whatever other criminal penalties the parties might have

incurred, the crime of conspiracy would not have been established and the defendant would be entitled to an acquittal. * * *"

The peculiarity of the crime of conspiracy which distinguishes it from substantive crimes is that presumably there have been no anti-social results and that the participants are being punished solely for their evil intent. It follows that if they were ignorant of the fact that the object or means employed by their combination was illegal, there is no evil intent to punish.

It is sometimes said that the federal courts have rejected the distinction between *malum in se* and *malum prohibitum* because all federal crimes are statutory and in a sense *malum prohibitum*. Yet the three cases cited in the opinion of the Circuit Court of Appeals below on the question of corrupt intent do not bear this out. They are *United States* v. *Mack*, 112 F. (2d) 290, 292 (C. C. A. 2nd, 1940); *Hamburg-American Steam Packet Co.* v. *United States*, 250 Fed. 747, 759 (C. C. A. 2nd, 1918); *Chadwick* v. *United States*, 141 Fed. 225, 242 (C. C. A. 6th, 1905). Although in the *Mack* case, involving a conspiracy to harbor and transport prostitutes, acts inherently unlawful, Judge Hand expressed some doubt as to the doctrine of the *Lauden* case, *supra*, yet the opinion is no authority for the proposition that a corrupt intent is not a necessary element to a conspiracy conviction. After briefly discussing the proposition, Judge Hand added: "Be that as it may, there was in this case 'corrupt motive' in abundance. * * *." The other two cases, *Hamburg-American Steam Packet Co.* v. *United States* and *Chadwick* v. *United States*, both involved offenses inherently wrong and unlawful. Speaking of them, the Circuit Court of Appeals for the Sixth Circuit, in *Landen* v. *United States*, *supra*, said (p. 781):

"We find nothing which goes further in modifying the generality of this principle than the decision of this court in the Chadwick Case, 141 Fed. 225, 243, 72 C. C. A. 343, to the effect that knowledge of the law which prohibits an act 'of evil design and wrongful purpose' will be imperatively imputed to the respondents, or the decision of the Second Circuit Court of Appeals, in the Hamburg-American Case, 250 Fed. 747, 758, 759, 163 C. C. A. 79, to the effect that, where the act to be done is malum in se, it is not controlling that the respondent does not in fact know of the specific prohibitory act. The principle of these two decisions does not reach a case where the contemplated act is not inherently wrongful, where the prohibitory statute is ambiguous, where there is good reason for both lawyers and laymen to think that the act planned is not prohibited, and where the respondent plans and does the act in the actual belief, supported by good-faith advice of counsel, that it is a lawful act. In such a situation the conclusion that the respondent has a 'corrupt intent' to violate the law is, in our judgment, one repugnant to the fundamental principles of justice, and not to be adopted unless under the compulsion of authoritative decisions. We find nothing requiring such adoption."

The *Hamburg-American* case and the *Chadwick* case each involved a conspiracy to commit acts which were inherently wrong according to ordinary standards of honesty and decency. For this reason these cases have no bearing upon the question under discussion, since in each the court held that, because the acts were inherently wrong, defendants' ignorance of the specific prohibition contained in the United States statute involved was not a defense. The crime for which the defendants were tried in the instant case surely was not *malum in se*.

In *United States* v. *Hoffman*, 137 F. (2d) 416 (C. C. A. 2nd, 1943), the court dealt with the importance of the question of criminal intent and its proper submission to the jury. The crime there charged was wilful failure to report for induction at the time ordered. The defendant did not deny that he failed to report on time, but offered explanations. There, as here, the central and dominating question for the jury was the corrupt intent of the accused. There the court recognized its prime importance and its proper submission to the jury. Here the court charged that defendants' intent, whether honestly to test the lawfulness of the act or actually to interfere traitorously with its operation, was immaterial.

Even if the rule of the *Landen* and *Powell* cases were to be completely disregarded and the defendants were presumed to know the consequences of bringing a test case, the evidence as related at pp. 63-67, *supra*, of this brief of lack of criminal intent is sufficient as a matter of law to rebut this presumption and raise a reasonable doubt as to the criminal intent of these defendants. In an event, the jury should have been permitted to pass upon this question.

In this regard, the defendants' reliance on advice of counsel given at the meeting of unit leaders late in September, 1940, is cogent proof of their lack of corrupt intent. *Miller* v. *United States*, 277 Fed. 721, 726 (C. C. A. 4th, 1921); *Kennedy* v. *Meacham*, 18 Fed. 312 (W. D. Tenn. 1883). In *Miller* v. *United States*, *supra*, the Court said (p. 726):

> "* * * But where the question, as in this case, is one of intent, the advice and good faith of the defendant is a defense to be considered by the jury. 12 Cyc. 156, and citations; State v. O'Neill, 147 Iowa, 513, 126 N. W. 454, 33 L. R. A. (N. S.) 788, Ann. Cas. 1912B, 691; Williamson v. U. S., 207 U. S. 425, 453, 28 Sup. Ct. 163, 52 L. Ed. 278."

Additional proof of the good faith of these defendants is found in the fact that no attempt at concealment was made. They frankly disclosed their part in the alleged combination to the F. B. I. and they knew at the time they performed the acts in question that Bund activities with regard to the Selective Service Act had received publicity through *The Free American*.

**D. *Summary Under This Point.***

1. By the language of the statute under which the defendants were indicted, the Government was required to prove beyond a reasonable doubt that they were guilty of a criminal intent.

2. The undisputed evidence established that defendants' sole purpose in preparing, distributing and making known to others the contents of Bundesbefehle No. 37 was to bring a case to test the constitutionality of Section 8(i) of the Selective Service Act.

3. It cannot be said that men who plan to test the constitutionality of an act of Congress are guilty of a criminal intent.

4. The District Court erred, therefore, when it charged the jury that the defendants' intention to bring a test case was immaterial on the issue of the guilt or innocence of the defendants and the Circuit Court of Appeals erred in approving this charge.

## POINT IV.

### The indictment was not sufficient.

**A. Failure to Charge the Only Conspiracy Condemned Under Section 11 of the Act, viz: "A Conspiracy to Hinder or Interfere by Force or Violence With the Administration of the Act.**

The indictment in this case is based upon Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. A. §311) which condemns a conspiracy to hinder or interfere by force or violence with the administration of the Act. Such a conspiracy, however, is the *only* conspiracy condemned by Section 11 of the Act. The section referred to does not make it a crime to conspire to counsel others to *evade* the Act.

At the trial of this case the defendants moved to dismiss the indictment on the ground that it charged no crime; this motion was denied (R. 15-16). The District Court's denial of the defendants' motion was based upon the reasoning in *United States* v. *O'Connell*, 126 F. (2d) 807 (C. C. A. 2nd, 1942); cert. den. in *Houlihan* v. *United States*, 316 U. S. 700 (1942).

In the *O'Connell* case the Circuit Court of Appeals held that "Section 11 of the Act was not restricted to "conspiracies to hinder or interfere in any way by force or violence with the administration of this Act," " and "the disjunctive clause 'or conspire to do so' includes conspiracies to commit all the preceding offenses." The Circuit Court of Appeals adhered to its decision in the *O'Connell* case in rendering its opinion in the instant case (R. 1077).

We submit that this Court should consider the full implications of the *O'Connell* case. Section 11 of the Act provides:

"(I) *Any person* * * * who shall knowingly fail or neglect to perform such duty, (II) *and any person* * * * who shall knowingly make * * * any false * * *, muster, (III) *and any person* who (a) * * * thereto, (b) or who otherwise evades * * * this Act, (c) or who knowingly counsels * * * another to evade * * * service * * * directions, (d) or who in any manner * * * Act, (IV) or *any person or persons*, who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, (V) shall, upon conviction * * * be punished * * * " (Numbers, letters and emphasis supplied).

This section sets forth two separate and distinct thoughts. The first is embraced by the portions of the statute designated I to III, inclusive, while the second is embraced within the words covered by IV. Thus, the first thought, when broken down, in substance says: (I) "any person", (II) "and any person", (III) "and any person" shall be punished, etc. These are all singular phrases and there must be two or more persons to comprise a conspiracy.

The second separate and distinct thought, expressed in the portion marked IV, is introduced by the words "or any person or persons", which is language typical of conspiracy statutes. These are the only plural words included in any of the four subdivisions. For this reason the clause "or conspire to do so" must relate to IV and not to I, II, or III, which are all singular phrases.

In the 1917 Act there was no phrase similar to "or conspire to do so" and conspiracies to evade the Draft Act were punished under the general conspiracy statute (18 U. S. C. A. §88) which provides a maximum penalty of two years imprisonment. Certainly if Congress, when enacting the new Selective Training and Service Act, had intended to

make sweeping changes so as to include conspiracies to "evade" the Act or to counsel others to evade the Act, it would have done so by clear and convincing language. Instead Congress merely provided that conspiracies to hinder or interfere by *force or violence* with the Act be punished by five years' imprisonment. The less heinous offense of conspiracy to do any of the other acts prohibited by the Act was left by Congress to be punished under the general conspiracy statute which provides a maximum penalty of two years' imprisonment.

The legislative history is silent concerning these changes. If Congress had intended such sweeping changes from the 1917 Act as are embodied in the decision by the Circuit Court of Appeals for the Second Circuit in the *O'Connell* case, there certainly would have been extensive legislative discussion. Thus the silence of the Congressional Record is convincing proof that Congress did not intend to change the Draft Act to punish conspiracies other than those to hinder or interfere by force or violence.

In the light of the foregoing facts, we respectfully submit that this Court should review the effect in the instant case of the decision in *United States v. O'Connell, supra*.

**B. Charging the Defendants With Having Conspired to Counsel Others to "Evade, Resist and Refuse" Service in the Land and Naval Forces of the United States in Violation of Section 11 of the Act, Whereas That Statute by Its Very Terms Proscribes Only Conspiracies to Counsel Others to "Evade" Service.**

The indictment charges a conspiracy "to counsel divers persons to evade, resist and refuse service in the land and naval forces of the United States" (R. 2).

The statute (50 U. S. C. A. §311), however, does not make it a crime to counsel anyone *to resist and refuse* service.

At most it merely makes it a crime to counsel someone to *evade* service. The words "resist and refuse" are not in the statute.

The statute reads: "or who knowingly counsels, aids or abets another to evade registration or service in the land and naval forces".

An indictment is defective where it charges a crime merely in the generic language of the statute. It must state the particulars of the crime with all of its elements.

The Circuit Court of Appeals for the Second Circuit stated in *Brenner* v. *United States*, 287 Fed. 636 (C. C. A. 2nd, 1922) at page 640:

> "The indictment must charge the offense in more than the generic terms as in the definition. It must descend to particulars. United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588. A crime, unless otherwise provided by statute, is made up of acts and intent, and they must be set forth in the indictment with reasonable particularity as to time, place and circumstances. Such particulars are matters of substance and not of form; and their omission is not aided or cured by a verdict."

The only fact appearing in the indictment as to what the defendants did as part of the conspiracy is the portion of the Bund Command No. 37, translation of which is quoted (R. 3):

> "Supposing the case should arise, everyone who can take it upon himself will therefore *refuse to do military service until this law and all other laws of the country or of the States, etc., which restrict the citizenship rights of Bund members are repealed!*"

We shall fight this issue of oppression out as a test case."

It is plain that this Broad Command does not counsel any one to evade military service, but, if anything, counsels outright refusal.

"Evade" and "resist or refuse" are not synonymous. These words have well defined meanings. In *Comen v. Mark Jewelry Co.*, 92 F. (2d) 498, 501 (App. D. C. 1937), it was said that the term "evade * * * signifies getting away from by artifice; or, avoiding, often by skill, dexterity or contrivance". Webster's International Dictionary defines "evade" as follows:

> "To get away from by artifice, to avoid by dexterity, subterfuge, address, or ingenuity; to escape from cleverly, as, to evade a blow, a pursuer, punishment; to evade the force of an argument".

The indictment will be searched in vain for any facts showing that the defendants did anything to conspire to counsel people to evade registration or service under the Act.

**C. Summary Under This Point.**

For the reasons that the indictment failed to charge the only conspiracy condemned by the statute and charged a conspiracy not proscribed by the statute, the indictment was insufficient as a matter of law.

## POINT V.

**The evidence was not sufficient to sustain the indictment or the verdict of the jury as against each defendant.**

The Government's case against the defendants failed to make out a *prima facie* case. As to many of the defendants, the Government's evidence was nothing more than suspicion that the defendants might have been parties to a conspiracy as charged in the indictment. It is well established that mere suspicion is not sufficient. *Marrash* v. *United States*, 168 Fed. 225 (C. C. A. 2nd, 1909); *Lucadamo* v. *United States*, 280 Fed. 653 (C. C. A. 2nd, 1922); *United States* v. *Potash*, 118 F. (2d) 54 (C. C. A. 2nd, 1941), cert. den. 313 U. S. 584 (1941). The rule was well stated in the *Marrash* case, *supra*, as follows (p. 231):

> "There are some *suspicious circumstances* and facts which seem to indicate that he had knowledge of the illegal nature of the transactions, *but there is nothing which rises to the dignity of proof required in criminal causes.* Knowledge by an alleged co-conspirator that the other defendants were attempting to defraud is not enough. *Mere suspicion that he was a party to the conspiracy is not enough.*" (Emphasis added.)

In view of the weakness of the evidence against many of the defendants, the admission of the incriminating statements made by Kunze and Wendlandt takes on added significance. It can be seen, furthermore, that since the evidence was extremely weak against many of the defendants, the prejudicial and inflammatory exhibits and the Department of Justice press release all influenced the jury to return a verdict of guilty and that such a verdict was not based

solely upon the evidence in the case. To imprison twenty-four men each for a five-year term on evidence, or lack of evidence, of this character, is a travesty upon justice.

The District Court was in considerable doubt as to the sufficiency of the evidence as against some of the defendants; particularly Schneller (R. 833), and the Circuit Court of Appeals likewise reflected this doubt in its opinion (R. 1077). The District Court, however, overruled the motions of the petitioners for directed verdicts at the close of the Government's evidence (R. 844). The District Court also overruled the motions made by the defendants to set aside the verdict and for a new trial (R. 1028, 1032-1033). While recognizing that there were degrees of guilt amongst the defendants, the District Court nevertheless sentenced all the defendants to five years imprisonment, the maximum imprisonment provided by the statute (R. 1061).

There follows a brief summary of the evidence introduced by the Government against each of the petitioners represented in this Court by assigned counsel. This summary clearly demonstrates that the Government's evidence was not sufficient to sustain the indictment or the verdict.

*Herman Agne*

The evidence concerning Agne came from the witness Ihlein (R. 613-617), Mueller (R. 617-620) and Heine (R. 620-629). Ihlein testified on direct, when led, that he was "doubtful" that Agne read Bund Order No. 37 to the Philadelphia unit (R. 615), and, on cross, said that it might have been read by someone else or even by the witness himself (R. 617). Mueller testified that one night Agne introduced Kunze who said "that it would be unfair to deny German-Americans the right to work on one hand and on the other hand expect them to serve in the armed forces" and "that the Bund would take steps to correct this unfairness" (R.

620). Agne thanked the speaker for coming and said that he hoped he had made an impression (R. 620). Heine, when asked if Agne was present at a meeting at which the Selective Service Act was discussed, said, "To my recollection he must have been there, because he usually was there" (R. 623).

*Joseph Bachmaier*

Only one witness was called by the Government to testify against Bachmaier: F. B. I. agent Stephenson (R. 630-637) who identified a written statement (Exhibit 299) given by Bachmaier to four agents of the F. B. I. on May 26, 1942 in Erie, Pennsylvania, having been taken from his job in a war plant at 3 A.M. for the purpose of giving this statement. Bachmaier acknowledged in his statement that the Erie unit of the Bund had not been organized until December, 1940—two months after Bund Order No. 37 was promulgated and distributed among the local units. The Government witness, Luedtke, previously had testified that the Erie unit had not been formed until December, 1940, and that it was "almost inevitable" that Bund Order No. 37 had never been distributed to Bachmaier and Schneller at the Erie unit (R. 251-252). Moreover the itineraries (Exhibits 127-134) of the national leader, Kunze, indicate that his first trip to the Erie unit was on December 4, 1940 (Exhibit 128) and that the only other trip ever made to the Erie unit was on June 14, 1941 (Exhibit 133). On the latter occasion Bachmaier and Schneller were the leaders of the Erie unit (R. 139). Despite the uncontradicted testimony that Bachmaier had no connection with the Bund until the formation of the Erie unit in December 1940, and the strong inference that Bund Order No. 37, issued two months prior thereto, had never come to his attention, the witness Stephenson nevertheless offered the highly incredible testimony (R. 632-635) that a month after he had obtained Bachmaier's

ten statement Bachmaier told him orally that upon organization of the Erie unit in December, 1940, he had received some back numbers of the Bund orders, included among which was Bund Order No. 37, but that he did not consider this of sufficient importance to reduce to a written statement.

On evidence of this character, the Government justifies the severance of Bachmaier's bonds with his wife and three small children while he serves a term of five years in a federal penitentiary (R. 1061).

*Josef Belohlavek*

Witnesses called by the Government against Belohlavek were F. B. I. agents Cleveland (R. 539-554) and Lyons (R. 567-578); Grabo (R. 555-560); Woessner (R. 560-566); and Foley (R. 710-712).

The witness Cleveland was called to identify a number of exhibits admitted in evidence against Belohlavek (Exhibits 245-264), included among which was a bust of Hitler, bund flags bearing swastikas, pictures of Hitler, an ash-tray, a song-book and buckles and pins bearing swastikas (R. 546-551).

The witness Lyons was called to identify a statement (Exhibit 265) which Belohlavek gave to him and another F. B. I. agent on May 26, 1942 in Cleveland. In this statement Belohlavek denied having read Bund Order No. 37 to members of the Cleveland unit but said that he laid it on the table and told them they could look at it if they so desired. The Government sought also through the witness Lyons to introduce a number of physical exhibits (Exhibits 266-284 for identification), including flags, pictures of Hitler, and Sam Brown belts (R. 571). These exhibits openly were marked for identification and brandished before the jury (R. 568-569), only later to be excluded from the record on the ground they had been seized from Belohlavek's home by illegal use of a subpoena duces tecum (R. 601).

The witness Grabo testified that Belohlavek had never read Bund Order No. 37 to the Cleveland unit but placed it on a desk for anyone who wished to read it (R. 556); that there were only four to six members of the Cleveland unit in October, 1940, all but one of whom were over draft age at the time (R. 559); and that this unit dissolved in October, 1940, the very month the Government claims Bund Order No. 37 was distributed (R. 560).

The witness Woessner testified also to the manner in which Bund Order No. 37 was handled by Belohlavek—never read, but placed on a table for those who were interested in it (R. 563-564).

The witness Foley, an obvious alcoholic, was called by the Government for the sole purpose of testifying to a conversation he claimed to have had with Belohlavek in the fall of 1940, during the course of which Belohlavek was reported to have said that if he were drafted and sent to the other side "he would run to Germany and fight against the United States" (R. 711). The incredibility of such testimony is borne out by the facts that Belohlavek at the time was over draft age (R. 559, Exhibit 265) and numerous members of his own family were in the armed services (R. 566).

*Walter Borchers*

The Government's case against Borchers consisted of the testimony of F. B. I. agents Smith (R. 372-380) and Cochrane (R. 380-383), and of the witness Erdmann (R. 365-372), together with a written statement (Exhibit 183) given by Borchers to F. B. I. agent Cochrane on May 26, 1942, in which he stated that he could not recall having read Bund Order No. 37 to the Jamaica, Long Island, unit.

Through F. B. I. agent Smith, the Government introduced a number of physical exhibits (Exhibits 156-182), included among which were pictures of Hitler, swastika flags and ladies' handkerchiefs. These articles were all received in evidence and demonstrated to the jury on September 30, 1942 (R. 373-377). On October 15, 1942, after these exhibits had been paraded before the jury every day for two weeks, they were expunged from the record on the ground they had been seized from Borchers' home by illegal use of a subpoena duces tecum (R. 851, 853).

The witness Erdmann testified that Borchers read Bund Order No. 37 to the Jamaica unit (R. 366-367).

*Otto Bregler*

The witnesses called by the Government against Bregler were F. B. I. agent Carson (R. 587-591), Meeker (R. 578-580) and Meyer (R. 580-587).

Through the witness Carson the Government sought to introduce certain exhibits (Exhibits 286, 287, 288, 289, 290, 291, 292-A, 292-B). The exhibits were received in evidence (R. 592) in full view of the jury and thereafter were excluded by the court on the ground they had been seized from Bregler's home by illegal use of a subpoena duces tecum (R. 601).

The witness Meeker was called to identify certain records (Exhibits 282, 283, 285) of the First National Bank of Lindenhurst, Long Island, where Bregler kept funds entrusted to him as treasurer of the Lindenhurst unit (R. 579, 582). These exhibits admittedly had not the slightest relevance to the charge for which Bregler was on trial.

The witness Meyer testified that Bund Order No. 37 was read by Bregler to the Lindenhurst unit (R. 582); that the meeting at which Bund Order No. 37 was read was the last meeting ever held of the Lindenhurst unit (R. 584-585);

that at this meeting, in addition to Bregler and the witness, there was only one other person present and that person was a woman (R. 585); and that the witness never had heard Bregler counsel anyone to evade, resist or refuse military service under the Selective Service Act (R. 583, 585).

*Gustav Elmer*

The only evidence introduced by the Government concerning Elmer was the testimony of Luedtke who said that Elmer was treasurer of the German-American Bund and also treasurer of the A. V. Publishing Company which published *The Free American* (R. 45). Neither the German-American Bund nor the A. V. Publishing Company were on trial in this case. As treasurer of the Bund, Elmer "used to see that various units were supplied with the paraphernalia necessary to run the units, such as application blanks and all forms of printed matter that were necessary for the units" (R. 45). Luedtke testified that Elmer was present at a meeting of the officers of the Bund at national headquarters shortly before the convention in 1940 when the policy was discussed and determined of opposing that provision of the proposed Selective Service Act which discriminated against German-American citizens (R. 83-88), but on cross-examination Luedtke admitted that this meeting could not possibly have taken place until after the Selective Service Act became a law on September 16, 1940 (R. 222). Luedtke also testified that Elmer occasionally handled the mimeographing of the Bund orders and sometimes placed the mimeographed Bund orders on the desks of the other officers, but he had no recollection as to who mimeographed Bund Order No. 37 and placed it on the officers' desks (R. 246-247).

No written statement by Elmer was introduced in evidence and the record will be searched in vain for an iota of evidence that Elmer ever counselled or assisted others in counselling evasion, resistance or refusal of military service under the Selective Service Act.

*Otto Fentzke*

The only witness called by the Government against Fentzke was Miss Steckler, a stenographer in the United States Attorney's office, who identified the transcript of a question and answer statement (Exhibit 355) which she prepared from notes taken by her at the time an assistant United States Attorney questioned Fentzke on May 15, 1942 in the United States Attorney's office (R. 737-742).

This statement disclosed that Fentzke was employed as a shipping clerk for *The Free American* (R. 739); that his duties as shipping clerk included the operation of an addressograph machine for the purpose of addressing issues of *The Free American*, as well as Bund orders, from time to time (R. 739), although he had no knowledge as to the contents of any of the material which he addressed (R. 739, 741); that as assistant leader of the New York local unit he received numerous Bund orders, including Bund Order No. 37, which he customarily read to the membership of his unit (R. 740); but that he had no recollection whatever of having read Bund Order No. 37 or of having heard any discussion whatever in reference thereto at any meeting of his local unit (R. 740-741).

On this evidence, Fentzke was convicted and sentenced to serve five years in a federal penitentiary (R. 1061).

*August Klapprott*

The principal evidence introduced by the Government against Klapprott was through the former secretary of the

Bund, Luedtke, the defendant who pleaded not guilty on July 10, 1942 and then, after four days of conferences with the United States Attorney, pleaded guilty on July 14, 1942 (R. 215-216) and testified at the trial as the Government's star witness.

Luedtke testified that Klapprott wrote articles for *The Free American* and was leader of the eastern department of the Bund (R. 29, 44-45); that in particular he wrote articles in *The Free American* opposing the discrimination against German-American citizens which was contemplated in legislation pending in Congress in August, 1940 (R. 265; Exhibits 144-A, 144-B); that Klapprott was present at the meeting of officers of the Bund in August, 1940, when the policy of opposing the discriminatory provisions in the Selective Service Act was discussed (R. 83-88), the meeting which Luedtke was forced to admit on cross-examination could not have taken place at the time he testified it occurred (R. 222); that Klapprott presided over a meeting of unit leaders shortly before the distribution of Bund Order No. 37 at which there was discussed the policy of the Bund of bringing a test case to determine the validity of the discriminatory provisions in the Selective Service Act (R. 109-110); and that Klapprott spoke to a group of Bund members back stage after a Christmas concert in December, 1941, announced that another concert had been scheduled and that those present should continue to practice and sing once or twice a week (R. 153-155). Luedtke also identified a picture of Klapprott at national headquarters (Exhibit 11) and a picture of Klapprott's desk at national headquarters (Exhibit 14).

*Bruno Knupfer*

The Government's case against Knupfer consisted of a showing that he was the leader of the Brooklyn unit (Exhibit

142-A); having become unit leader in the middle of 1940 (R. 322); that he attended the 1939 and 1940 conventions of the Bund (Exhibits 124, 125); that he designated himself and others as delegates to the 1940 convention (Exhibits 109, 110, 111, 113); that he attended the unit leader meeting in early October, 1940, at which Kunze and Keegan spoke concerning the discriminatory provisions in the Selective Service Act (R. 109); but at this meeting Knupfer said nothing (R. 110).

The witness Krotz testified that Knupfer read Bund Order No. 37 to the Brooklyn unit (R. 324) and that in a discussion which followed Knupfer stated that the Bund was going to test the discriminatory provision in the statute, which it had a right to do (R. 329). Another witness, Friedrich, testified that Kunze and Keegan, not Knupfer, read Bund Order No. 37 (R. 334-337). Knupfer admitted in a written statement (Exhibit 151) given to F. B. I. agent Bartlett on May 26, 1942 that he had read Bund Order No. 37 to the Brooklyn unit. Bartlett also introduced some material (Exhibits 152, 153, 154, 155) which he had seized from Knupfer's home on May 26, 1942; this material consisted of a song book, a trade guide, a book of subscription blanks for preferred stock in the A. V. Publishing Company and an envelope addressed to Knupfer from national headquarters of the Bund (R. 353-365).

*Gerhard Wilhelm Kunze*

It would be beyond the scope of this Point to endeavor to summarize the Government's evidence against Kunze, the national leader of the Bund. Admittedly, considerable evidence was introduced by the Government showing the manner in which he discharged his official duties as head of the organization (Exhibits 6-A, 87); his activities at national headquarters (R. 43-54); his numerous trips to the

various local units throughout the country (Exhibits 127-134); his participation at the national conventions (R. 89); his action in formulating and rendering articulate the policy of the Bund in opposing the discriminatory provisions in the Selective Service Law, particularly in drafting and distributing Bund Order No. 37 (R. 82-88); and his contributions to *The Free American* from time to time (R. 45).

All other evidence introduced by the Government against Kunze, however, was inconsequential in comparison with the incriminating statement (Exhibit 358) procured from him by agents of the F. B. I. on July 6, 1942. The circumstances under which this statement was obtained and the nature of its contents have been discussed fully at pp. 22-24, *supra*, of this brief. Without this statement, the climax of the Government's case, the conviction of all but one of the defendants could not have been obtained.

*Walter Schneller, Jr.*

We believe that the error committed by the Circuit Court of Appeals in holding, as did the District Court, that there was sufficient evidence to sustain the indictments and the verdict as against Schneller, was a particularly flagrant error. Neither the Circuit Court of Appeals (R. 1077), nor the District Court (R. 833), was without doubt as to the sufficiency of the evidence as against Schneller.

The only evidence offered against Schneller was a newspaper article written by him for an Erie newspaper in the issue of October 18, 1940 (Ex. 300), and the conclusory testimony of Luedtke without any supporting detail (R. 141) that on June 14, 1941 Schneller was one of the local leaders in Erie. The newspaper article attacks the Selective Service Act as a piece of class legislation. Admittedly, it was written about two months before the Bund ever approached

Schneller about joining. It, therefore, could not have been an act in furtherance of a conspiracy operating through the Bund: the only conspiracy charged, according to the court's instruction to the jury (R. 1018). Exhibit 300 was objected to on the specific ground (R. 637-638) that at the time it was written Schneller admittedly was in no way connected with the Bund. The objection was overruled and the trial judge instructed the jury as follows (R. 638-639):

> "I will say to the jury that this article is dated October 18, 1940, at a time when it has been alleged a conspiracy existed. If you after you hear all the evidence are satisfied beyond a reasonable doubt that the defendant Schneller *at that time* was a member of any conspiracy as alleged then you may consider the article as evidence against all parties. Unless you do from all of the evidence when you have heard it believe that Schneller was a member of the conspiracy as alleged then I will direct you not to regard it as against anyone." (Emphasis added.)

It is clear that when the trial judge admitted Exhibit 300 with the remarks to the jury just quoted, he expected that further testimony connecting Schneller definitely with the alleged conspiracy would be introduced by the Government. *None was.* The entire case against him consisted of the oral testimony of Luedtke about seeing Schneller in Erie eight months later and Exhibit 300. Under the court's instruction with regard to the exhibit quoted above, it could not properly have been considered even against Schneller himself. The foregoing is the sum total of the evidence offered against Schneller.

The condition of the record when the case was given to the jury was such that the only evidence against Schneller open to them was the bare conclusion of Luedtke that on

June 14, 1941 (Ex. 133) Schneller was one of the group leaders in Erie. The article in the Erie newspaper (Ex. 300), and any statements with regard to Schneller made by Bachmaier in the latter's signed statement given to the F. B. I. (Ex. 299), are out of the case.

As already pointed out, under the instructions of the court at the time of the admission in evidence of Schneller's article in the Erie newspaper, this could not be considered even against Schneller unless the jury, after hearing all the evidence in the case, found that at the time of the publication of the article, October 18, 1940, he was a member of the conspiracy. The Government had shown affirmatively that the first overtures of the Bund to Erie were in December, 1940 (Exhibits 127-134). There was, therefore, no basis for finding that Schneller "at that time" was a member of the conspiracy and therefore the jury had no right to consider Exhibit 300 against Schneller. The Circuit Court of Appeals in considering this phase of the matter said (R. 1077):

> "We think that even the appellant Schneller was implicated for, in October, 1940, he had written a newspaper article attacking the draft; in December, 1940 he was visited by Kunze at Erie, and thereafter, at least as early as June, 1941 became a unit leader. These relations with the activity of the Bund were sufficient to justify the submission to the jury of his participation in the conspiracy."

The fallacy in this is clear. The Circuit Court of Appeals regarded the newspaper article as part of the case against Schneller and yet under the specific instructions of the trial court to the jury at the time of the admission of the newspaper article in evidence, coupled with the unquestioned fact that at that time he could not have been a member of the

conspiracy, eliminated the exhibit from the case so far as the jury had any right to consider it.

The admissibility of the document for any purpose was doubtful. As is pointed out in 2 Wigmore on Evidence (3d ed. 1940), §302, the admissibility of similar acts to prove intent depends upon the assumption that the act charged was done. Wigmore says (p. 200):

> "It will be seen that the peculiar feature of this process of proof is that the *act itself is assumed to be done*, — either because (as usually) it is conceded, or because the jury are instructed not to consider the evidence * * * until they find the act to have been done and are proceeding to determine the intent." (Emphasis as in original.)

Since as to Schneller there was no evidence whatsoever of any subsequent act, the intent of which it was necessary to clarify, this purpose was inapplicable. He certainly could not be convicted upon the basis of evidence admitted to show the intent of a subsequent act when no such subsequent act is conceded or proven.

At the time of the motion to dismiss as to the defendant Schneller, the trial court was in considerable doubt whether the motion should not be granted (R. 832-833):

> "I would like to hear you on that, and also I would like to hear you as to the evidence which the Government relies on against Mr. Rothwell's defendant, Schneller. I am of the opinion in passing, without arriving at a conclusion, that the publication of the article in the newspaper, about which the gentleman testified, Schneller wrote in the newspaper, that that alone is not sufficient to sustain a conviction, and I would like to hear the Government on the question of what evidence it

does rely on as to that particular individual, and anything else that the Government may wish to argue."

In answer to this request of the court, the Government (R. 837) restated the evidence against Schneller as above set forth and added that the witness Heine (of the Philadelphia unit) had testified about the Erie unit. An examination of his testimony (R. 620-629) will disclose that only in the most general way did he refer to a remark made by Kunze about a new unit in Erie. He was unable to fix the time of the meeting but said that he remembered it was "quite cold" (R. 625). An examination of Exhibit 128, which shows Kunze's first visit to Erie on December 4, 1940, also shows a visit to Philadelphia on December 7, 1940. This undoubtedly is the meeting to which Heine referred, but his testimony in no way mentions Schneller.

*Hermann Schwinn*

Luedtke testified that Schwinn was leader of the western department of the Bund (R. 29); that he also was leader of the Los Angeles local unit (R. 286-287); and that he resigned his membership in the Bund in October, 1940 (R. 283-284), the month in which Bund Order No. 37 was distributed. The minutes of the 1940 national convention of the Bund (Exhibit 7-A, p. 73) disclose that Schwinn and the national leader, Kunze, engaged in a sharp dispute arising from Schwinn's insistence that more English be spoken among Bund members and that the Bund be Americanized in other respects.

Schwinn read Bund Order No. 37 to the Los Angeles local unit, according to the witnesses Woeppelmann (R. 288), who testified he thought it had been read because it was the "general proceeding" to read Bund orders at meetings (R. 291-293); Kendzia (R. 294), who recalled no discussion whatever about Bund Order No. 37; Bibo (R. 300);

and Young (R. 304); the amateur detective who, in frequently reporting the activities of the Bund to Naval Intelligence authorities beginning as early as 1940 (R. 315-316, 320), admittedly never once reported that Schwinn had counselled anyone to evade, resist or refuse military service.

That Schwinn never gave such counsel was testified to by Young (R. 346) and by Kendzia (R. 297), both of whom were called by the Government which vouched for their credibility.

*Fritz Streuer*

Streuer has been characterized correctly as the forgotten man of this case (R. 924). Aside from the testimony of Luedtke that Streuer was leader of the Detroit local unit (R. 141), the only evidence in reference to Streuer was the testimony of the Government witnesses Ahrens (R. 752-755) and Unrecht (R. 756-762), both of whom testified that Streuer read Bund Order No. 37 at Springfield Park near Detroit some time in the fall of 1940 (R. 753, 757). The testimony of both witnesses was of the most hazy, indefinite character, a situation not wholly unrelated to their fondness for drink (R. 754-755; 759-760) in which one at least was encouraged by an Assistant United States Attorney (R. 759).

*Hugo Weiss*

The evidence against Weiss, aside from Luedtke's testimony that he was leader of the Astoria, Long Island, local unit (R. 94), consisted of his written statement (Exhibit 204), dated May 26, 1942, together with six documents and physical exhibits (Exhibits 205-210), identified by F. B. I. agent Jenkins (R. 470-476) as having been taken from Weiss' home. These exhibits were received in evidence and circulated among the jury on October 2, 1942 (R. 475), only to be expunged from the record two weeks later (R. 851) on the ground they had been seized by illegal use of a subpoena duces tecum.

Weiss admitted in his statement (Exhibit 204) given to F. B. I. agent O'Neil (R. 468-469) that he had read Bund Order No. 37 to either the Ridgewood or Astoria local unit, although he was not certain as to which one. After reading Bund Order No. 37 to the members, he "told them that they had to comply with the Act, as well as with any other law of the United States".

*Karl Richard Wendlandt*

The Government's case against Wendlandt, who was the leader of the Buffalo local unit (R. 640, 658), consisted of the testimony of F. B. I. agent Young (R. 656-709) and the witnesses Schleich (R. 639-656; 713-715), Raebble (R. 715-721); Krueger (R. 721-726) and Braunschweiger (R. 780-786). Numerous documentary and physical exhibits (Exhibits 301-341) were also received in evidence against Wendlandt. Included among the exhibits admitted in evidence against him, were three written statements given by him to agents of the F. B. I. (Exhibits 309, 330, 331).

No useful purpose would be served here by a detailed summary of the evidence against Wendlandt, which simply follows the usual pattern of evidence introduced by the Government against an active local leader, in this case one whose local unit was diminishing rapidly in size and influence (R. 641). There was evidence that Wendlandt read Bund Order No. 37 to the Buffalo local unit (R. 641, 717, 722).

As in the case of Kunze, however, all the other evidence against Wendlandt mentioned above was dwarfed in importance by the admission into evidence of the incriminating statement (Exhibit 331) taken by the F. B. I. on July 8, 1942 and the oral statements made by Wendlandt to the F. B. I. agent who took his written statement. The circumstances under which this statement was obtained and the nature of its contents have been discussed fully at pp. 24-26, *supra*, of this brief.

*Otto Willumeit*

The Government's case against Willumeit, the leader of the Chicago local unit (R. 93), consisted of the testimony of the witnesses Oltmanns (R. 505-518), Drochner (R. 518-527) and Kiefer (R. 527-539).

Oltmanns testified that Willumeit did read Bund Order No. 37 to the Chicago local unit (R. 508), but that during the discussion which followed, Willumeit advised that although the rights of German-American citizens had been curtailed by the discriminatory provision in the Selective Service Act and some effort should be made to test the constitutionality of this provision, Bund members nevertheless should register under the Act and serve in the armed forces, a course which all members of the Chicago local unit followed (R. 508-509).

Drochner testified that he never heard Bund Order No. 37 read by Willumeit and had not seen it until it was shown to him by an F. B. I. agent in the course of investigation in this case (R. 521).

Kiefer testified that Willumeit read Bund Order No. 37 to the membership of the Chicago local unit in October, 1940 (R. 528), and that at this meeting Kunze outlined the intention of the Bund to bring into the courts a case to test the constitutionality of the discriminatory provision in the Selective Service Act. Kiefer could recall no member of the Chicago local unit who had refused to register or serve under the Act (R. 535).

***Summary Under This Point.***

All the defendants rested at the conclusion of the Government's case and did not take the witness stand. In so doing they acted upon the advice of their assigned counsel who firmly believed, and still believe, that the Government failed to make out a *prima facie* case as a matter of law. The in-

sufficiency of the evidence against the defendants, either to support the indictment or to support the verdict, highlights the errors committed by the District Court in admitting the incriminating statements against Kunze and Wendlandt, as well as the inflammatory and prejudicial exhibits. Likewise, in view of the weakness of the evidence against many defendants, the errors committed by the District Court in taking from the jury the question of the defendants' intention to bring a test case and in refusing to grant a mistrial when the inflammatory press release was issued by the Department of Justice, appear grave.

## CONCLUSION.

The judgments of conviction of all petitioners should be reversed.

Dated: New York City, October 20, 1944.

Respectfully submitted,

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CORRELATION BETWEEN FACTS CONCERNING STATEMENTS PROCURED FROM KUNZE AND WENDLANDT AND THOSE INVOLVED IN THE McNABB, ANDERSON, GROS, HAUPT, HOFFMAN AND RUNNELS CASES

| | OPERATIVE FACTS | McNABB v. US. 318 U.S. 332 (1943) | ANDERSON v. US. 318 U.S. 350 (1943) | GROS v. US. 136 F.(2d) 678 (C.C.A.9th, 1943) | U.S. v. HAUPT 136 F.(2d) 661, (C.C.A. 7th, 1943) | U.S. v. HOFFMAN 137 F.(2d) 416 (C.C.A. 2nd, 1943) | RUNN 138 (C. |
|---|---|---|---|---|---|---|---|
| 1. | NATURE OF CHARGE AGAINST DEFENDANTS | Second-degree Murder (p. 333) | Conspiracy to Damage T.V.A. Property (p. 351) | Conspiracy to Disclose to Germany Information About Our National Defense and Failure to Register as Agent of Germany (p. 879) | Treason (p. 663) | Violation of Section 11 of Selective Service Act (p. 416) | Mur |
| 2. | OFFICERS WHO MADE ARREST | Agents of Alcohol Tax Unit of Bureau of Internal Revenue (p. 333) | Sheriff of Polk County, Tennessee and His Deputies (p. 353) | Agents of the F.B.I. (p. 880) | Agents of the F.B.I. (pp. 666-67) | Agents of the F.B.I. (p. 420) | Tow Cou Off |
| 3. | SEQUENCE OF ARREST, PROCUREMENT OF STATEMENT AND ARRAIGNMENT | First Arrest, Then Procurement of Statement; No Evidence That They Were Ever Arraigned (p. 334) | First Arrest, Then Procurement of Statements and Thereafter Arraignment (p. 356) | First Arrest, Then Procurement of Statement; No Evidence That They Ever Were Arraigned (p. 880) | First Arrest, Then Procurement of Statements and Thereafter Arraignment (p. 665) | First Arrest, Then Procurement of Statements and Arraignment Thereafter Presumed (p. 421) | Fir Pro men Arr |
| 4. | PERIOD DURING WHICH QUESTIONING TOOK PLACE, PRIOR TO SIGNING STATEMENT AND PRIOR TO ARRAIGNMENT | Two days (p. 345) | Six days (p. 353) | Five days (p. 880) | Four to Seven days (pp. 666-67) | Four days (p. 420) | Sev |
| 5. | PLACE ARRESTED PERSON WAS QUESTIONED | Cell in Federal Building, Chattanooga, Tennessee (p. 334) | County Jail and T.V.C.A. in Copperhill, Tennessee (pp. 352-25) | Cell in F.B.I. Field Office in Los Angeles, California (p. 880) | Homes of Arrested Persons, F.B.I. offices, Chief of Police's Office and Village Jail in Winnetka, Illinois (pp. 666-67) | Federal Building in Brooklyn and Federal House of Detention in New York City (pp. 420-21) | Cel Jai (p. |
| 6. | NUMBER OF ARRESTING OFFICERS PRESENT DURING QUESTIONING | Six Agents of Alcohol Tax Unit (p. 336) | One to Four Agents of the F.B.I. (pp. 352-55) | "Several" agents of the F.B.I. (p. 880) | Indefinite Number of Agents of the F.B.I. (pp. 666-67) | One Agent of F.B.I. and Government Prosecutor (pp. 420-21) | Ind Fed (p. |
| 7. | NUMBER OF FRIENDS, RELATIVES OR COUNSEL PRESENT DURING QUESTIONING | None (p. 336) | None (pp. 353, 356) | None (p. 880) | [Opinion does not indicate] | [Opinion does not indicate] | No not fri pre |
| 8. | ADVICE GIVEN TO ARRESTED PERSON IN REGARD TO NECES- | That They Need Not Give a Statement Unless They Desired To; That They Were Not | [Opinion does not indicate] | [Opinion does not indicate] | None given (p. 667) | [Opinion does not indicate] | [Op. ind |

FACTS CONCERNING STATEMENTS PROCURED FROM KUNZE AND WENDLANDT IN THE McNABB, ANDERSON, GROS, MAUPI, HOFFMAN AND RUNNELS CASES

| U.S. v. MAUPI 136 F.(2d) 661, (C.C.A. 7th, 1943) | U.S. v. HOFFMAN 137 F.(2d) 416 (C.C.A. 2nd, 1943) | RUNNELS v. U.S. 138 F.(2d) 346 (C.C.A. 9th, 1943) | KUNZE'S STATEMENT OF JULY 6, 1942 (EXHIBIT 358) | WENDLANDT'S STATEMENT OF JULY 8, 1942 (EXHIBIT 331) |
|---|---|---|---|---|
| Treason (p. 663) | Violation of Section 11 of Selective Service Act (p. 416) | Murder (p. 346) | Conspiracy to Counsel Evasion, Resistance and Refusal of Service Under Selective Service Act (R. 1-2) | Conspiracy to Counsel Evasion, Resistance and Refusal of Service Under Selective Service Act (R. 1-2) |
| Agents of the F.B.I. (pp. 666-67) | Agents of the F.B.I. (p. 420) | Town Marshal and County Deputy Sheriffs (p. 347) | Agents of the F.B.I. (R. 794) | Agents of the F.B.I. (R. 682) |
| First Arrest, Then Procurement of Statements and Thereafter Arraignment (p. 665) | First Arrest, Then Procurement of Statements and Arraignment Thereafter Presumed (p. 421) | First Arrest, Then Procurement of Statement and Thereafter Arraignment (p. 347) | First Arrest, Then Procurement of Statement and Thereafter Arraignment (R. 794-796) | First Arrest, Then Procurement of Statement; No Evidence That He Ever Was Arraigned (R. 682, 691) |
| Four to Seven days (pp. 666-67) | Four days (p. 420) | Seventeen days (p. 347) | Eighteen hours (R. 794-796) | One day (R. 682, 691) |
| Homes of arrested Persons, F.B.I. offices, Chief of Police's Office and Village Jail in Winnetka, Illinois (pp. 666-67) | Federal Building in Brooklyn and Federal House of Detention in New York City (pp. 420-21) | Cell in Yakima County Jail, Yakima, Washington (p. 347) | Cell in United States Courthouse, New York City (R. 794) | Cell in Erie County Jail in Buffalo, N.Y. (R. 691) |
| Indefinite Number of Agents of the F.B.I. (pp. 666-67) | One Agent of F.B.I. and Government Prosecutor (pp. 420-21) | Indefinite Number of Federal and State Officers (p. 347) | Three Agents of the F.B.I. (R. 796) | Two Agents of the F.B.I. (R. 691) |
| [Opinion does not indicate] | [Opinion does not indicate] | No counsel; opinion does not indicate whether friends or relatives were present (p. 347) | None (R. 794-796) | None (R. 691) |
| None given (p. 66) | [Opinion does not indicate] | [Opinion does not indicate] | That He Need Not | That He Need Not |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 6. | NUMBER OF ARRESTING OFFICERS PRESENT DURING QUESTIONING | Six Agents of Alcohol Tax Unit (p. 336) | One to Four Agents of the F.B.I. (pp. 352-55) | "Several" agents of the F.B.I. (p. 880) | Indefinite Number of Agents of the F.B.I. (pp. 666-67) | One Agent of F.B.I. and Government Prosecutor (pp. 420-21) | Indefi Federa (p. 34 |
| 7. | NUMBER OF FRIENDS, RELATIVES OR COUNSEL PRESENT DURING QUESTIONING | None (p. 336) | None (pp. 353, 356) | None (p. 880) | [Opinion does not indicate] | [Opinion does not indicate] | No cou not in friend presen |
| 8. | ADVICE GIVEN TO ARRESTED PERSON IN REGARD TO NECESSITY OF MAKING STATEMENT, USE TO BE MADE THEREOF, ETC. | That They Need Not Give a Statement Unless They Desired to; That They Were Not Required to Answer Questions; That any Statement Given Would Be Used Against Them (p. 336) | [Opinion does not indicate] | [Opinion does not indicate] | None given (p. 669) | [Opinion does not indicate] | [Opini indic |
| 9. | FORCE, VIOLENCE, COERCION, OR THREAT THEREOF, EXERTED UPON ARRESTED PERSON DURING QUESTIONING | None (pp. 336-337) | [Opinion does not indicate] | None (p. 880) | [Opinion does not indicate] | [Opinion does not indicate] | None ( |
| 10. | GROUNDS OF OBJECTION TO ADMISSIBILITY OF STATEMENT AT TRIAL | That Statements Were Obtained Through Coercion (p. 349) | That Statements Were Involuntarily Obtained (p. 351n) | Corpus Delicti Not Otherwise Shown (p. 880n) | That Statements Were Involuntarily Obtained (p. 669) | Not Objected To (p. 419) | That St tained And Wer Given ( |
| 11. | INSTRUCTIONS GIVEN BY TRIAL COURT IN REGARD TO ADMISSIBILITY OF STATEMENT AGAINST DEFENDANTS OTHER THAN THE ONE WHO SIGNED STATEMENT | [Opinion does not indicate] | Statements Admitted Only Against the Persons Who made Them (p. 356) | Only One Defendant On Trial (p. 879) | Jury Instructed That Statements Were To Be Considered Only Against The Defendants Who Made Them (p. 666) | Only One Defendant on Trial (p. 417) | Only on Trial |
| 12. | DISPOSITION BY THE APPELLATE COURT OF CONVICTIONS BASED UPON INCRIMINATING STATEMENTS OBTAINED WHILE PERSON IS UNDER ARREST BUT BEFORE ARRAIGNMENT | All Convictions Reversed (p. 347) | All Convictions Reversed (p. 357) | Reversed and Remanded For a New Trial (p. 881) | All Convictions Reversed and Remanded For New Trials (p. 676) | Reversed and Remanded For a New Trial (p. 422) | Reverse a New T |

| | | | | |
|---|---|---|---|---|
| Indefinite Number of Agents of the F.B.I. (pp. 666-67) | One Agent of F.B.I. and Government Prosecutor (pp. 420-21) | Indefinite Number of Federal and State Officers (p. 347) | Three Agents of the F.B.I. (R. 796) | Two Agents of the F.B.I. (R. 691) |
| [Opinion does not indicate] | [Opinion does not indicate] | No Counsel; opinion does not indicate whether friends or relatives were present (p. 347) | None (R. 794-796) | None (R. 691) |
| None given (p. 669) | [Opinion does not indicate] | [Opinion does not indicate] | That He Need Not Give a Statement Unless He Desired To; That Any Statement Given Would Be Used Against Him; That He Would Be Promised No Immunity or Remuneration (R. 788) | That He Need Not Give a Statement Unless He Desired To; That Any Statement Given Would Be Used Against Him (R. 691) |
| [Opinion does not indicate] | [Opinion does not indicate] | None (p. 347) | None (R. 794-796) | None (R. 691) |
| That Statements Were Involuntarily Obtained (p. 669) | Not Objected To (p. 419) | That Statements Were Obtained Through Coercion And Were Not Voluntarily Given (p. 347) | General Objection (R. 788) | General Objection (R. 692) |
| Jury Instructed That Statements Were To Be Considered Only Against The Defendants Who Made Them (p. 666) | Only One Defendant on Trial (p. 417) | Only One Defendant on Trial (p. 346) | Jury Instructed That Statement Was To Be Considered In the Case Against Manne Only (R. 789) | Jury Instructed That Statement Was To Be Considered In the Case Against Wendlandt Only (R. 692) |
| All Convictions Reversed and Remanded for New Trials (p. 676) | Reversed and Remanded For a New Trial (p. 422) | Reversed and Remanded For a New Trial (p. 348) | | |

# APPENDIX A.

# APPENDIX B.

New York Times

October 5, 1942

## BUND LEADERS FACE LOSS OF CITIZENSHIP

### Biddle Opens Drive Against All Who Were Naturalized by 'False' Representations

### Their Internment Stated

### F. B. I. Records Against Hundreds of Ex-Members Will Figure in the Actions

Special to The New York Times.

WASHINGTON, Oct. 3—A broad program was announced by Attorney General Biddle today to revoke the naturalization of all former leaders and officials of the German-American Bund whose citizenship was obtained by false representations.

Those whose naturalization is revoked will become alien enemies and be liable to internment for the duration of the war. Mr. Biddle said that he could order their internment.

Simultaneously, instructions were sent to United States attorneys to start proceedings at once against naturalized citizens whose Bund activities indicated that their oaths of allegiance to the United States were taken fraudulently or to further the interests of Germany.

In view of the large amount of litigation expected, the attorneys were directed to petition the courts to consolidate

the cases in each judicial district in so far as the common issue of the un-American character of the Bund was concerned. The program is being handled for the Department of Justice by Durward E. Balch under the direction of Wendell Berge, assistant attorney general in charge of the Criminal Division.

## Bund Trials Yield Data

It is being started simultaneously in all communities where the Bund was active up to the time of its formal dissolution last December, after investigations of many months by the Federal Bureau of Investigation. F. B. I. records have covered the Bund activities of hundreds of former members. In addition, numerous Federal grand jury investigations and criminal prosecutions of prominent Bund officials had yielded important evidence both as to the subversive nature of the Bund, and as to the activities of many individual members, the Department of Justice said.

"Evidence assembled by the Department of Justice," Mr. Biddle said, "gives incontestable proof of the un-American, pro-Nazi character of the German-American Bund. In the eighteen years that it and its predecessor organizations flourished here under our democratic hospitality, it worked unceasingly in behalf of the German Reich and against the interests of America.

"In the last decade, particularly, the Bund has been an arm of aggressive Nazi world diplomacy—an instrument of the German 'Auslands Organisation' with headquarters at Stuttgart. Its avowed policy has been to resist integration of Germans into the American system; to retain the complete loyalty of its members to Germany, and to establish in the United States a branch of the German Reich.

"The aims and purposes of the Bund are wholly inconsistent with American citizenship. Loyalty to one excludes

loyalty to the other. It therefore follows that those Germans who became naturalized American citizens and at the same time turned actively to the affairs of the Bund are guilty of fraud. Their oaths of allegiance were not honestly taken.

"We are moving at once to clean out this source of danger to our national security. The courts will be asked to denaturalize these disloyal Bundists. Deprived of their citizenship, they automatically become alien enemies. As such I shall order them interned for the duration of the war."

## The Denaturalization Process

The denaturalization law requires the government to petition the court for the revocation of a given individual's certificate of naturalization. The petition must be substantiated by evidence of alleged disloyalty or other facts tending to show that citizenship was fraudulently obtained or that the defendant did not truthfully subscribe to the oath of allegiance. The defendant is then allowed sixty days in which to file an answer to the petition. After hearing, the court renders its decision as to whether the petition is to be granted or denied.

The defendant may appeal an unfavorable decision to a higher court. If he failed to contest the petition, as has been the case in the majority of denaturalization proceedings thus far, his citizenship was revoked by default, the Department of Justice said.

"Approximately 500 denaturalization cases were completed, and are now pending in the courts, or are under active consideration by United States Attorneys at the present time," the Department of Justice said. "However, many of those who already have been proceeded against are also former members or officials of the Bund.

"Chief among these are Fritz Kuhn and August Klapprott, former national 'Fuehrers.' Another National 'Fuehrer,' Gerhard Wilhelm Kunze, is not subject to denaturalization, since he is a native-born citizen. However, he has been sentenced to fifteen years' imprisonment for espionage; a charge, it was shown at his trial, directly related to his Bund activities.

"In addition, some thirty national or local Bund leaders are under indictment or have entered pleas of guilty in the Southern District of New York for conspiring to violate the Selective Service Act or the Alien Registration Act."

## REPRESENTATION OF PETITIONERS THROUGHOUT THIS CASE

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|---|---|---|---|
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| Joseph Bachmaier | Albert C. Rothwell, Esq. | Albert C. Rothwell, Esq. | Albert C. Rothwell, Esq. |
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